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THE BIRDS

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JURISPRUDENTIAL VERTIGO: THE SUPREME COURT'S VIEW OF "REAR WINDOW" IS FOR THE BIRDS*

Donald A. Hughes, Jr.**

The Court's decision in *Stewart v. Abend*¹ is a step backward for the law of copyright into shadows and murkiness. The termination provisions² of the 1976 Copyright Act³ and their legislative history⁴ are unambiguous with regard to the continued use of derivative works after the termination of the prior grants which created them. Because the precise issue in *Stewart* arose under the Copyright Act of 1909⁵ and in the context of a renewal rather than a termination, the Court was theoretically free to pretermit the state of the law after January 1, 1978.⁶ But the Court's failure to recognize and to emphasize the clear import of the 1976 Copyright Act for derivative works under the termination provisions⁷ — provisions which are the direct statutory successors of the renewal right⁸ — perpetuates

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¹ *Stewart v. Abend*, 110 S. Ct. 1750 (1990), *aff'g*, *Abend v. MCA, Inc.*, 863 F.2d 1465 (1988).

² 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (1982).

³ The 1976 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-914 (1982) [hereinafter the 1976 Act or the new Act] (*amending* the 1909 Copyright Act, Pub. L. No. 349, 35 Stat. 1075 (1909)).

⁴ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 127, 141, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5743, 5757.

⁵ The 1909 Copyright Act, Pub. L. No. 349, 35 Stat. 1075 (1909) [hereinafter the 1909 Act or the old Act] (formerly codified at 17 U.S.C. §§ 1-216 and amended by the 1976 Copyright Act, Pub. L. No. 94-553, 94 Stat. 2541 (1976)).

⁶ January 1, 1978 was the date on which the 1976 Copyright Act took effect. P.L. 94-553, 90 Stat. 2541 at 2598, transitional and supplementary provision § 102.

⁷ 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (1982).

⁸ The 1909 Copyright Act, 17 U.S.C. § 24 (1909).

unnecessarily a dichotomy in treatment between derivative works governed by the 1909 Copyright Act and those governed by the 1976 Copyright Act. The Court's inattentiveness is all the more exasperating because the Second Circuit had already in place a rule to conform the nebulous treatment of derivative works under the 1909 Copyright Act to the clear mandate of the 1976 Act in *Rohauer v. Killiam Shows, Inc.*⁹ Further, in 1986, when the *Stewart* litigation was incipient, one commentator had already delineated the crux of the controversy in such cogent detail¹⁰ that the Court's peremptory lip service to the status of derivative works seems at best disingenuous and at worst willfully obscure.¹¹

I. THE ANTECEDENT LAW AND THE 1976 COPYRIGHT ACT

Prior to the adoption of the 1976 Copyright Act, the law of copyright in the United States had as one of its emblematic features a two-tiered structure of copyright protection.¹² Under the

⁹ *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949 (1977).

¹⁰ Colby, *Rohauer Revisited: "Rear Window," Copyright Reversions, Renewals, Terminations, Derivative Works and Fair Use*, 13 PEPPERDINE L. REV. 569 (1986).

¹¹ One should have suspected that something was amiss perhaps when confronted by the dissent in *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985). Justice Stevens for the majority in a 5 to 4 decision had occasion to examine 17 U.S.C. § 304(c)(6)(A) and to find grants from grantees included in the purview of the exception to termination. *Snyder*, 496 U.S. at 164-76. Justice White, with whom Justices Brennan, Marshall, and Blackmun joined, gratuitously observed that "[w]hen the exception was formulated, and indeed when it was enacted, the prevailing understanding of the 1909 Act was that the owners of the renewal right in a copyrighted work might exercise a veto power over continued performance of a derivative work that had been created under a first-term grant" (citations omitted). *Snyder*, 469 U.S. at 183 (White, J., dissenting).

Five years later after the composition of the Court had changed, Justice Stevens found himself writing the dissent in *Stewart*, joined by Chief Justice Rehnquist and Justice Scalia. *Stewart*, 110 S. Ct. at 1769. Justice White concurred in the result reached by the majority because he believed that *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), required it. *Stewart*, 110 S. Ct. at 1769. If there should still be any doubt, it is this author's contention that Justice Stevens has been consistently correct, at least as far as the result he would have the Court obtain, in both *Snyder* and *Stewart*, and that the decision in *Stewart* was egregious.

¹² 1909 Copyright Act, 17 U.S.C. § 24 (1909). This two-tiered protection was embodied in section 1 of the first United States Copyright Act, 1 Stat. 124, 1st Cong. 2d Sess., c. 15 (1790), which afforded an American author an initial period of 14 years and a second period of 14 years upon application and recordation. The Copyright Act of 1790 was

1909 Copyright Act, protection was initially secured for a period of twenty-eight years and could be renewed for an additional twenty-eight year period for a maximum of fifty-six years of protection.¹³ This "second bite of the apple" provision was characterized as an equitable safeguard for authors and their dependents, through the exercise of which souls artistic but unskilled in the ways of commerce might recoup in some measure the appreciation in value their works had accrued since they had transferred them.¹⁴ Of course, it did not take those skilled in the ways of commerce long to structure the conditions of sale or assignment in such a way as to require the transfer of the renewal rights up front. The "freedom" to contract being inviolable, the Court did not initially balk at allowing authors and artists to sign away these renewal rights on the front end of the first period of protection,¹⁵ but it did subsequently insist that the au-

based in large measure on the Statute of Anne, 8 Anne, c. 19 (1710), which had instituted the two-fold system of 14 year periods for works still unpublished.

¹³ The 1909 Copyright Act, 17 U.S.C. § 24 (1909).

¹⁴ H.R. REP. NO. 2222, 60th Cong., 2d Sess., 14 (1909) (discussed in *Stewart*, 110 S. Ct. at 1759).

¹⁵ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943). *Fred Fisher Music* was a controversy over the validity of an advanced assignment of the renewal interest in the song, "When Irish Eyes Are Smiling." *Id.* at 645. Justice Frankfurter wrote the decision for the Court, concluding that "neither the language nor the history of the Copyright Act of 1909 lend support to the conclusion that the 'existing law' prior to 1909, under which authors were free to assign their renewal interests if they were so disposed, was intended to be altered." *Id.* at 656. The Court's decision in *Fred Fisher Music* eviscerated, so to speak, the "second-bite" policy underlying the two-tiered structure of copyright protection.

Justice Douglas, one of three dissenters in *Fred Fisher Music*, would subsequently pen the majority opinion in *Miller Music Corp. v. Charles N. Daniels, Inc.* which resuscitated the "second bite" protection in limited fashion by upholding an executor's claim in the renewal interest of the song, "Moonlight and Roses," against the claim of a prior assignee. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 377-78 (1960). Justice Douglas opined with regard to the 1909 Copyright Act:

Section 125 reflects, it seems to us, a consistent policy to treat renewal rights as expectancies until the renewal period arrives. . . . Until that time arrives, assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. A purchaser of such an interest is deprived of nothing. Like all purchasers of contingent interests, he takes subject to the possibility that the contingency may not occur. . . ."

Miller Music, 362 U.S. at 377-78.

Commentators subsequently questioned the wisdom and the fairness of *Fred Fisher Music* and its progeny. In *An Unhurried View of Copyright*, Benjamin Kaplan states:

thor or artist be alive when the renewal period begins in order to effectuate the prior grant.¹⁶

But more problematic than the question of ownership of one copyright in a maze of contractual obligations is the relationship between a preexisting or underlying copyright owner and the owner of a copyright taken in a derivative work made

The effect of the *Fred Fisher* case and other authorities is that if the author is dead when the twenty-eighth year comes round, the renewal reverts free and clear, to his widow, children, and so forth in a fixed order of precedence; but if the author is alive in that year, the original sale holds and there is no reversion. The distinction is hard to defend and may operate in a peculiarly perverse way where on the faith of a transfer from the now-deceased author, the transferee has created a "derivative work," say a movie based on the original novel."

B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 113 (1966); see also Chaffee, *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 722-24 (1945) (contending that publisher will never pay more than small speculative price for renewal term since he is never sure it will be profitable); Nimmer, *Termination of Transfer under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 949-51 (1977) (*Fred Fisher Music* frustrated renewal concept's objective of providing authors with second opportunity to market their works). For a more deferential view of the Court's pronouncements in *Fred Fisher Music* and *Miller Music Corp.*, see STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STUDY NO. 31, RENEWAL OF COPYRIGHT 154-56 (1961) (prepared by Barbara Ringer with the assistance of Julius Culp).

¹⁶ *Miller Music Corp. v. Charles N. Daniels, Inc.* 362 U.S. 373, 377-78 (1960). Justice Douglas's resuscitation of the "second bite" policy was effected over the dissenting voices of Justices Harlan, Frankfurter, Whittaker, and Stewart, for whom the specter of an author who might defeat a prior assignment by bequest was more horrific than effectuating a mere expectancy, even though no such intent was manifest in the facts before them. *Miller Music Corp.*, 362 U.S. at 378 (Harlan, J., dissenting). The reverence with which Justice O'Connor adduced *Miller Music Corp.* in *Stewart* belied *Miller Music's* status as a decision of a narrow majority who were not denying an author's ability to bargain away his renewal right but rather were insisting that there be some limits on that ability, and as a decision concerning an original work not a derivative work. *Stewart*, 110 S. Ct. at 1759-60. The centrality accorded to *Miller Music Corp.* by the majority in *Stewart* was obviously unjustified in light of the 1976 Copyright Act's recasting of the "second bite" policy in the termination provisions, 17 U.S.C. §§ 203, 304 (1982), provisions which make the termination right inalienable under any circumstances prior to the termination period. At bottom, the Copyright Act has legislatively overruled *Fred Fisher Music Co.* and transformed the conditional right of renewal into the inalienable right of termination.

But further and more to the point, the adduction of *Miller Music Co.* was peculiarly inapposite for the resolution of a problem with a derivative work, since *Miller Music Co.* did not concern a derivative work. It is the problem of overlapping expectancies on the part of the underlying copyright owner and the derivative copyright owner that created the litigation in *Stewart*. The Court's failure to address the root cause of the underlying dispute is disheartening.

from that preexisting work.¹⁷ The most salient error that the Court made in deciding the *Stewart* case was taking as the gra-

¹⁷ See generally Ellingson, *The Copyright Exception for Derivative Works and the Scope of Utilization*, 56 IND. L.J. 1 (1980). Ellingson succinctly traces the history of the renewal right of the 1909 Act in the courts. *Id.* at 12-19. She sees the existing decisions as a continuum. *Id.* at 28. She believes that *Fitch v. Shubert*, 20 F. Supp. 314 (S.D.N.Y. 1937), *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951), *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968), and *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976), all suggest that when the rights to the underlying work are lost by operation of contract, the derivative work may not be used any longer. Ellingson, 56 IND. L.J. at 24. Her readings of *Edwards v. Stern*, 248 F. 897 (2d Cir. 1918) and *Sunset Sec. Co. v. Coward McCann Inc.*, 297 P.2d 137 (Cal. 1956) *vacated on other grounds*, 47 Cal. 2d 907, 306 P.2d 177 (1957), suggest that when the rights to an underlying work are lost by operation of contract, the derivative work may continue to be used. Ellingson, 56 IND. L.J. at 24. She seems to place *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), *cert. denied*, 431 U.S. 949 (1977), between the earlier lines of cases and finds in *Rohauer* the proposition that when rights to the underlying work are lost because operation of law vests renewal rights in another, then the derivative work may continue to be used, "at least, to an extent." Ellingson, 56 IND. L.J. at 24.

The limitations on the further use of the derivative work are found in the language of §§ 203(b)(1), 304(c)(6)(A) which provides that they may continue to be used "under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." 17 U.S.C. §§ 203(b)(1) & 304(c)(6)(A) (1988). Ellingson then delineates the possible tensions that might develop, one might better say will develop, when the continued use is neither strictly according to the terms of the grant nor the preparation of another derivative work. Ellingson, 56 IND. L.J. at 32-42. For a more specific discussion of the problem of derivative works in the movie industry one should consult Peter Jaszi's article, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 U.C.L.A. L. REV. 715 (1981). Jaszi represented the defendant-appellant in *Rohauer*, and his scholarship is comprehensive and accurate. Jaszi believes that the interest-balancing approach that Judge Friendly adopted in *Rohauer* is the correct one to take when the derivative work is a motion picture:

The analysis is sensitive to the peculiar character of the motion picture medium and of other art forms to which it can be persuasively analogized. . . . Because other kinds of derivative works may involve less input—and thus less transformation of material borrowed from underlying work—the court's reasoning may not be fully applicable to situations involving derivative works other than motion pictures.

Id. at 760-61.

Jaszi also believes that the public interest in, one might say the public access to, derivative motion pictures is a significant factor but one that passed *sub silentio* in Judge Friendly's analysis. *Id.* It is this author's contention that the interest-balancing approach taken by Judge Friendly is applicable to all derivative works because it is required, certainly under the 1976 Act, and by implication under the 1909 Act. See *infra* discussion in section III C.

vamen of its decision the question of the renewal right rather than the question of the conflict between the preexisting copyright and the derivative copyright.¹⁸ A derivative work is:

a work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a "derivative work."¹⁹

Because the creation of a derivative work necessarily incorporates some facet of the preexisting work (hence, obviously, the title derivative), there arise in fact if not in theory overlapping and conflicting expectations between the owner of the copyright in the preexisting work and the owner of the copyright of the derivative work. It is just such conflicting expectations which birthed the *Stewart* litigation, and it is just such conflicting expectations that will continue to generate litigation now that the Court has refused to extend retroactively the freedom from control provided for derivative copyright owners under the 1976 Act to owners of derivative works prepared under the 1909 Act.

The drafters of the 1976 Copyright Act sought to clarify as best they could what boundaries had been established in the gray area between the preexisting work's copyright and the derivative work's copyright by § 7 of the 1909 Act and its judicial gloss when they wrote § 103.²⁰ Section 103(a) extends copyright

¹⁸ *Stewart*, 110 S. Ct. at 1759-60.

¹⁹ 1976 Copyright Act, 17 U.S.C. § 101 (definitions).

²⁰ 17 U.S.C. § 103 states:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, [sic] any copyright protection in the preexisting material.

protection to derivative works (and compilations) but withholds from them any protection for material used unlawfully, i.e., without permission. Section 103(b) mandates that the copyright in a derivative work is independent of the copyright in the pre-existing work and that it covers only that material contributed anew by the author of the derivative work and does not cover any material in the preexisting work. Were § 103 the extent of congressional consideration of the problem of conflicting expectations outlined above, one could justify the result in *Stewart* as an attempt to draw a bright line that preserves without encroachment the bundle of rights of the preexisting copyright owner with one pass of Occam's razor.

But § 103 was not all Congress had to say about the subject of derivative works in the 1976 Act. There are a few other elements of the 1976 Act which must be taken, synoptically, as it were, for an accurate understanding of exactly how egregious was the Court's decision in *Stewart*. The first is the fundamental change in the duration of copyright protection effected by the 1976 Act. The change in the duration of protection for most works of declared authorship from the two-tiered system of initial protection for twenty-eight years with a right of renewal for another twenty-eight years to a general scheme of protection lasting for the life of the author plus fifty more years obviated considerations of renewal for all works created after January 1, 1978,²¹ copyrighted after that date,²² or already in their renewal period on that date.²³ Only works in their first twenty-eight year period on January 1, 1978, are still governed by a procedure of renewal set forth in section 304(a),²⁴ but this procedure will become obsolete on December 31, 2005 (twenty-eight years after the last twenty-eight year period of initial protection could possibly have started). The concepts and procedures of renewal are dying and will be completely laid to rest in fifteen years.

But, as two eminent commentators on the law of copyright in the United States have observed, "[o]ne advantage of the re-

17 U.S.C. § 103 (1976).

²¹ 17 U.S.C. § 302 (1988).

²² 17 U.S.C. § 303 (1988).

²³ 17 U.S.C. § 304(b) (1988).

²⁴ 17 U.S.C. § 304(a) (1988).

newal term—that it gives the author a second bite of the apple—dies hard.”²⁵ The drafters of the 1976 Act, still desirous of some paternalistic mechanism to curb the potential for abuse in a marketplace in which naive or neophyte authors or artists might bargain away their rights with no possibility for renegotiation, created a new right, the right of termination. This new right to terminate prior transfers or licenses is separate and different from the bundle of rights secured for the copyright owner by section 106.²⁶ It vests in the author or her heirs (except in the case of a work made for hire) rather than in the owner of the copyright and may, if the words of the statutes are to be given credence, “be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”²⁷ The right to terminate prior grants and licenses is a one-time right, granted by Congress in two different situations. In general, grants executed after January 1, 1978, may be terminated thirty-five years after the execution of the grant during a five year period.²⁸ Authors of works already in their first or second term of protection on January 1, 1978, may generally terminate their prior grants during a five year period after fifty-six years from the date their copyright was originally secured, in or-

²⁵ R. BROWN & R. DENICOLA, *CASES ON COPYRIGHT* 387 (5th ed. 1990).

²⁶ 17 U.S.C. § 106 provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based on the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted works publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

²⁷ 17 U.S.C. §§ 201(a)(5), 304(c)(5) (1988).

²⁸ Under § 203(a)(3) the general right to terminate any grant made after January 1, 1978, not including works made for hire or grants made by will, may be exercised during a five year period that begins after 35 years from the execution of the grant, or if the grant covers the right of publication, 35 years after publication or 40 years after the execution of the grant, whichever term ends earlier. 17 U.S.C. § 203(a)(3) (1988).

der to repossess the extra nineteen years of protection the 1976 Act conferred on them.²⁹

Yet despite this legislative reinstitution of the "second-bite" right in new, inalienable form, a legislative overruling by Congress of the Court's rationale in *Fred Fisher Music Co.*, the drafters of the 1976 Act at the same time expressly excluded from the purview of the termination provisions extant derivative works, provided that they continue to be used under the terms of the original grant.³⁰ There can be no doubt that, were the grant which generated the controversy in *Stewart* to have been given after January 1, 1978, the owners of the copyright in the derivative work, that is the owners of the motion picture, would be completely free to exhibit that motion picture unencumbered by any of the wishes or expectations of Mr. Abend. Whether the windfall the last decade provided to movie producers in the form of videocassette sales comes within the terms of the original grant is perhaps a more open question. In any event, it should be clear that the Court's focus on § 103 by itself, without equal consideration of §§ 203 and 304, was unjustified. The question,

²⁹ Section 304(c)(3) provides a right of termination for any copyright existing on January 1, 1978, in its first or second term of protection, to recapture the 19 year "wind-fall" period of protection afforded such works under § 304(a). 17 U.S.C. § 304(c)(3) (1988). The § 304(c)(3) right may terminate any prior grant, not including works made for hire or grants made by will, during a five year period that begins after 56 years from the date copyright was originally secured or beginning on January 1, 1978, whichever is later. *Id.*

³⁰ The right to create the derivative work or to create another derivative work is extinguished by termination, but not the right to continue to use and to market the derivative work.

17 U.S.C. § 203(b)(1) (1988) provides:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

Id.

17 U.S.C. § 304(c)(6)(A) (1988) provides:

A derivative work prepared under the authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after termination of other derivative works based on the copyrighted work covered by the copyrighted grant.

Id.

then, becomes why did the Court feel constrained to reach a result based on prior, conflicting theories which was diametrically opposite to the clear and unmistakable statements of Congress about what we are to do with derivative works under the 1976 Act.

II. FACTS

Author Cornell Woolrich initially sold the magazine rights for his story, "It Had to Be Murder," to Popular Publications, Inc. in 1942.³¹ Woolrich then sold the motion picture rights to "It Had to Be Murder" along with the movie rights to five other stories to B.G. De Sylva Productions in 1945 for \$9,250.³² As part of the sale, Woolrich agreed to renew the copyrights in the six stories upon the expiration of their initial terms and to reassign the motion picture rights to De Sylva Productions for the twenty-eight-year renewal term.³³ In 1953, Patron, Inc., a production company formed by Jimmy Stewart and Alfred Hitchcock, acquired the motion picture rights to "It Had to Be Murder" and created from it the movie "Rear Window" in 1954. Woolrich died in 1968, one year before he could renew the copyright in "It Had to Be Murder," and having no immediate family, left all of his property in trust for the benefit of Columbia University.³⁴ The executor of the trust did renew the copyright, but then assigned it to Sheldon Abend in exchange for \$650 and ten percent of all proceeds from the story.³⁵

³¹ *Stewart*, 110 S. Ct. at 1755. "It Had to Be Murder" was published in 1942 in *Dime Detective Magazine*, which was published by Popular Publications. *Id.* Popular Publications obtained only the magazine publication rights and did not obtain a "blanket copyright" for the whole issue in which "It Had to Be Murder" was published. *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Stewart*, 110 S. Ct. at 1755-56. One commentator has observed that "the case [the first litigation between Abend and Stewart et al. in 1974] is of some special interest because the plaintiff asserting copyright claim was a 'literary speculator' who had purchased from the Woolrich estate rights in works underlying at least four motion pictures, apparently with a view asserting those rights against users of the film." Jaszi, *supra* note 17, at 739 n.63 (citing to the *Amicus* Brief of United Artists Corp. in *Rohauer*). Petitioner's Brief in the instant case asserts that "Respondent Abend, a 'literary researcher,' has determined that at least 600 films pose the same 'reversion' issue as the instant case. He has acquired at least 100 renewal copyrights underlying such films for himself and his

In 1974, Abend first filed suit against Stewart, Hitchcock, and MCA, Inc., the owners of the copyright in "Rear Window,"³⁶ but he dismissed the suit in return for \$25,000.³⁷ After the Court of Appeals for the Second Circuit decided *Rohauer v. Killiam Shows, Inc.*,³⁸ Stewart et al. re-released "Rear Window" in a number of formats, including videocassettes, and exhibited it in theatres, on cable television, and through video rentals.³⁹ Abend subsequently filed another suit in the United States District Court for the Central District of California on April 10, 1984.⁴⁰

The owners of "Rear Window" filed motions for summary judgment based on the *Rohauer* decision and on alleged defects in the copyright.⁴¹ Mr. Abend in turn filed a motion for summary judgment, alleging that the use of "Rear Window" was infringement of his copyright.⁴² Stewart et al. then filed a third motion for summary judgment, claiming that their use of "Rear Window" was fair use.⁴³ The District Court granted the motions made by Stewart et al. and denied the motion made by Abend.⁴⁴ The Court of Appeals for the Ninth Circuit, however, reversed the decision of the District Court, rejecting its reliance on *Rohauer* and the termination provisions of the 1976 Copyright Act, and instead recast the issue to focus on the renewal interest.⁴⁵ The Supreme Court then granted certiorari to resolve the

clients." PETITIONER'S BRIEF, LEXIS screen 67 (citing to Record at 87 and to Abend's depositions numbers 10-11, 22-24).

³⁶ Alfred Hitchcock had by this time passed away, but he was represented by the co-trustees of his will. *Stewart*, 110 S. Ct. at 1756. Jimmy Stewart, MCA, Inc., Universal Film Exchanges, a subsidiary of MCA, and the co-trustees of Hitchcock's estate will hereinafter be referred to as Stewart et al.

³⁷ It may ultimately have been the willingness of Stewart et al. to pay to settle the first suit which persuaded the Court that Abend was entitled to some remuneration in the next litigation.

³⁸ *Rohauer*, 551 F.2d 484, cert. denied, 431 U.S. 949 (1977).

³⁹ *Stewart*, 110 S. Ct. at 1756.

⁴⁰ PETITIONER'S BRIEF, LEXIS screen 26.

⁴¹ *Stewart*, 110 S. Ct. at 1756.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* The Ninth Circuit relied on *Miller Music Corp., Inc. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), opining that "[i]f *Miller Music* makes assignment of the renewal rights in the underlying copyright unenforceable when the author dies before effecting renewal of the copyright, then *a fortiori*, an assignment of part of the rights in

conflict which the Ninth Circuit's decision had created with *Rohauer*.⁴⁶

III. ANALYSIS

A. *Miller Music Corp.*

Justice O'Connor made clear the Court's espousal of the issue as framed by the Ninth Circuit in the first analytical portion of the opinion, section II A:

Petitioners would have us read into the Copyright Act a limitation on the statutorily created rights of the owner of an underlying work. They argue in essence that the rights of the owner of the copyright in the derivative use of the preexisting work are extinguished once it is incorporated into the derivative work, assuming that the author of the preexisting work has agreed to assign his renewal rights. Because we find no support for the curtailment of rights in either the 1909 Act, the 1976 Act, or the legislative history of either, we affirm the judgment of the Court of Appeals.⁴⁷

It is fitting that the Court's analysis does at least begin with some adumbration of the tension between the preexisting copyright and the derivative copyright. But it is an analysis which begins already blind to the express, statutorily created limit on the rights of the owner of the underlying copyright that are operative in two sections of the 1976 Act, the so-called termination provisions.⁴⁸ Not only are these provisions readily apparent with even the most cursory investigation of the 1976 Act but their legislative history clearly indicates congressional intent to curtail the rights of the underlying copyright owner in two limited contexts.⁴⁹ Second, the petitioner's argument was not, in essence, that "the rights of the owner of the copyright in the derivative

the underlying work, the right to produce a movie version, must also be unenforceable if the author dies before effecting renewal of the underlying copyright." *Stewart v. Abend*, 863 F.2d 1465, 1476 (9th Cir. 1988) (cited in *Stewart*, 110 S. Ct. at 1757).

⁴⁶ *Stewart*, 110 S. Ct. at 1758.

⁴⁷ *Id.*

⁴⁸ 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (1988).

⁴⁹ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 127 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5743.

use of the pre-existing work are extinguished once it is incorporated into the derivative work," a proposition that is as awkward and unprofitable logically as it is verbally, but rather that the derivative copyright owner may continue to use the derivative work according to the terms of the original grant, even when an attempt to assign the renewal interest to the derivative copyright owner has failed.⁵⁰

The power to make a derivative work is one of the expressly enumerated rights granted to a copyright owner in § 106. But once the owner of the underlying copyright has acquiesced to the making of a derivative work and the derivative work has in fact been made, the derivative work is outside the sphere of control of the underlying copyright holder. This principle is recog-

⁵⁰ Petitioners phrased the Questions Presented as follows:

Section 24 of the 1909 Copyright Act (as extended in part by section 304(a) of the 1976 Copyright Act) grants two consecutive terms of copyright for works created before 1978. Under this two term scheme, if an author dies before renewal, a statutory successor is entitled to renew. Section 7 of the 1909 Copyright Act (reenacted as section 103 of the 1976 Copyright Act) gives the same section 24 rights to an author, who, with consent, uses protectible parts of one or more underlying works ("prior works") to create a new work ("derivative work"). The questions presented involve a frequently occurring circumstance: (a) the author of a prior work (here, a short story) authorized another author to create and distribute a derivative work (here, the motion picture *Rear Window*) during the prior work's first and renewal terms, but, before renewal, the author of the prior work died and that work's copyright was renewed by a statutory successor.

1. Under section 24 of the 1909 Copyright Act (as partially reenacted in the 1976 Copyright Act), does the fortuity of the death of a prior work's author (and renewal of that prior work's copyright by a statutory successor) extinguish rights of a derivative work's owner, arising from section 7 and the prior author's grants, to distribute the separately copyrighted derivative work during the prior work's renewal term?

2. Does the succession to the renewal right entitle a prior author's successor to suspend the derivative work [sic] owner's section 24 right to exploit an independently copyrighted derivative work created with the prior author's consent?

3. If section 24 inadvertently gave a statutory successor of a prior work's author the right to prevent or punish the continued distribution of a derivative work because of the death of the prior work's author, may distribution of the work nevertheless continue under the doctrine of "fair use"?

PETITIONER'S BRIEF, LEXIS screen 15. Perhaps the Court is to be forgiven if, when inverting language already ponderous of its own bulk, it created a turn of phrase even more cumbersome and obtuse. What is clear is that petitioners did not assert the proposition that the Court ascribes to them.

nized in the 1976 Copyright Act in the termination provisions, and the reason for this recognition is fundamentally one of fairness. The derivative work is a work in its own right, albeit one based on a preexisting work. It is not analogous to a license to reproduce the underlying work for a particular period of time which is void when the period expires. One cannot go back in time and undo the derivative work; for good or ill it has been created, frequently on a scale and at a cost which dwarf the underlying work. The *Stewart* litigation is a good example. The considerable talents of Alfred Hitchcock, Jimmy Stewart, and Grace Kelly were the collateral that bankrolled the 1.1 million dollar production.⁵¹ It should be made clear, however, that the rights of the underlying copyright owner do extend to control plans for other derivative works not yet made, even to those contemplated by the authors of the first, extant derivative work.⁵² The controversy is not about the right to authorize the creation of a derivative work, a right expressly granted to the owner of the underlying copyright, but rather about the right to control a derivative work after it has been created. The language of the termination provisions makes it unambiguously clear that, for works governed by the 1976 Act at least, derivative works, once created, may continue to be used by the derivative copyright owner according to the terms of the original agreement, irrespective of the wishes or the expectations of the owner of the underlying copyright.⁵³

But the clear import of the 1976 Act for derivative works was not on the mind of the Court in *Stewart*. Justice O'Connor, having only alluded to the tension inherent between underlying and derivative copyrights, immediately turned the discussion to § 24 of the 1909 Act. Because Stewart et al. had asserted that § 24 and its interpretive case law were "directly" controlling,⁵⁴ a proposition also urged upon the Court by the Register of Copy-

⁵¹ PETITIONER'S BRIEF, n. 12, LEXIS screen 22. That figure excludes deferred compensation to Hitchcock and Stewart, and does not include the estimated 1.4 million dollars in initial distribution costs. *Id.*

⁵² 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (1988).

⁵³ *Id.*

⁵⁴ *Stewart*, 110 S. Ct. at 1760.

rights as *Amicus Curiae*,⁵⁵ the Court bottomed virtually the whole of its decision on an analysis that didn't squarely address the fundamental issue. It was most painfully obvious that Woolrich's prior assignment of the renewal rights was legally inoperative under the holding of *Miller Music Corp.* But neither § 24 nor *Miller Music Corp.* addressed the question of what to do with derivative works lawfully made in the first period of protection when an intended assignment of the renewal rights has failed. The Court was not in error in assuming the validity of Abend's copyright in "It Had to Be Murder" but rather in assuming that the validity of Abend's copyright was somehow dispositive of the issue. In other words, assuming at the very outset that Abend owned the copyright in "It Had to Be Murder" for the renewal period, what was his resultant interest in "Rear Window," if any, and under what theory? That question was the heart of the matter, and it was territory that the Court never really charted, as it were, preferring instead the security of settled but inapposite principles, to wit:

After *Miller Music*, if the author dies before the commencement of the renewal period, the assignee holds nothing. If the assignee of all the renewal rights holds nothing upon the death of the assignor before arrival of the renewal period, then, *a fortiori*, the assignee of a portion of the renewal rights, e.g., the right to make a derivative work, must also hold nothing (citation omitted) ("[A]ny assignment of renewal rights made during the original term is void if the author dies before the renewal period.") Therefore, if the author dies before the renewal period, then the assignee may continue to use the original work only if the author's successor transfers the renewal right to the assignee. This is the rule adopted by the Court of Appeals below and advocated by the Register of Copyrights (citation omitted). Application of this rule to this case should end the inquiry.⁵⁶

A review of the concepts of actuality and potentiality should make visible the Court's error.⁵⁷ It is perfectly true that Stewart

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ One might start with Aristotle's *Metaphysics*, Book ix, 1048b:

et al. no longer owned the right to produce a derivative work when the assignment of the renewal interest failed at Woolrich's death. This is true, despite the manifest intent of the contracting parties that the renewal right pass, because of the Court's pronouncement in *Miller Music Corp.* The problem is that Stewart et al. legally exercised their right to produce a derivative work in 1954, in the first period of protection, fifteen years before Woolrich's death invalidated the transfer of the renewal rights. "Rear Window" was absolutely free from control by Woolrich's successors from 1954 until 1969.

At base, the law must choose in this situation among making extant derivative works subject to control by the underlying copyright owner, the result reached by the Court in *Stewart*, making some scheme of arbitration or negotiations, concepts already embraced by the 1976 Act in several important areas⁶⁸ but difficult to implement judicially, and making extant derivative works free from the control of the underlying copyright owner as long as they continue to be used according to the terms of the original grant, the result reached by the termination provisions of the 1976 Act. Had the new Act never addressed the question, the Court would have been free, jurisprudentially speaking, to take the position that it did in fact take. But this question was answered by the 1976 Act, and the fact that Congress's answer was not to the liking of the Court, without more, is not enough

Actuality means the existence of the thing, not in the way we express by 'potentiality'; we say that potentially, for example, a statue of Hermes is in the block of wood and the half-line is in the whole, because it might be separated out, and even the man who is not studying we call a man of science, if he is capable of studying. Otherwise, actually. Our meaning can be seen in the particular cases by induction, and we must not seek a definition of everything but be content to grasp the analogy,— that as that which is building is to that which is capable of building, so is the waking to the sleeping, and that which is seeing to that which has its eyes shut but has sight, and that which is shaped out of matter to the matter, and that which has been wrought to the unwrought. Let actuality be defined as one member of this antithesis, and potentiality by the other.

Id. (W.D. ROSS, ARISTOTLE'S METAPHYSICS (1924)).

⁶⁸ The 1976 Act includes provisions for compulsory licensing for secondary transmissions of cable systems, 17 U.S.C. § 111 (1988); for phonorecords, 17 U.S.C. § 115 (1988); for jukeboxes, 17 U.S.C. § 166 (1988) (although § 116A, which provides for negotiated licenses is now in effect); and for compulsory arbitration to set fees for secondary transmissions by satellite, 17 U.S.C. § 119 (1988).

to justify its ignoring it.

To be fair to the Court and to the analysis, one must recognize that the relationship between "It Had to Be Murder" and "Rear Window," while certainly the archetype of the parent, preexisting work and the derivative work, does not necessarily fall under the class of legal obligations governed by the 1976 Act. One could proceed under the assumption that, since the assignment by Woolrich to De Sylva and Woolrich's executor's renewal both occurred well before the 1976 Act took effect, the commands of the 1976 Act have no authority over this case, no matter how clearly they are stated. "It Had to Be Murder" was first copyrighted in 1942.⁵⁹ "Rear Window" was made in 1954.⁶⁰ Woolrich died in 1968, allowing his executor to renew in 1969.⁶¹ Thus, on January 1, 1978, when the 1976 Act took effect, "It Had to Be Murder" was already in its renewal period, its final period of copyright protection. The derivative work, "Rear Window," was then almost a quarter of a century old.

Thus, a more honest and less violative rationale for the Court's decision in *Stewart* would have been that, because all of the operative facts occurred before the 1976 Act took effect, its pronouncements about derivative works in the termination provisions were not idoneous. Under such a theory, the Court would still have been able to force *Stewart et al.* to negotiate with Abend, thus effecting a distribution of some of the "windfall" profits from videocassette sales and rentals to the underlying copyright's author's successor in interest, profits outside the ken or imagination of the parties to the original assignment, and yet would also have based the decision on legal analysis that at least encompasses the true source of the dispute: the conflicting expectations of the owners of the underlying copyright and of the derivative work.⁶² Such a rationale would have empowered the

⁵⁹ *Stewart*, 110 S. Ct. at 1755.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² One of the ineluctable conflicts in copyright law is the result of changing technology. It is the unforeseen or unanticipated market that opens up for a work, and it usually requires a court to hypothesize what the parties' intentions would have been for something they clearly did not envision. For example, works which originally were novels or plays found new markets in radio, movies, television, cable television, videodisk, video-

successors in interest of deceased authors to extract negotiations, keeping faith with *Miller Music Corp.*, and at the same time have made it clear that the basis for the decision was the effective date of the 1976 Act. It would have achieved the same result without propping up for our view the obsolescent straw-man of the renewal right.

But, while not obviously so, using the effective date of the 1976 Act as a rationale to avoid exempting derivative works from the control of the owner of the underlying copyright would also have been a mistake for two reasons. First, there was simply no good reason for the Court to perpetuate a two-tiered system to decide questions about derivative works. The 1976 Act has made derivative works in existence exempt from the underlying work's author's right of termination, which right is the only vehicle in the new Act that guards the "second bite" policy that heretofore underlay the renewal right. Of what jurisprudential utility was a decision to resolve this dispute in exactly the opposite manner from that prescribed for those works controlled by the 1976 Act? If indeed this question was an open question under the 1909 Act but one that has been squarely answered by the 1976 Act, what purpose at all was there in the deliberate pretermission of that answer, even if one was not strictly constrained to abide by it? No utility and no purpose whatsoever.

Second, the 1976 Act does seek to affect works that were copyrighted before its effective date. The lengthening of the period of protection in §§ 304(a) and 304(b) for works in either their first or second periods of protection obviously evinces the intent of Congress to extend the benefits of the new Act to

cassette, etc. Technological advancement and the new markets it brings are always just around the corner, waiting to trip up even the most nimble of contract drafters. See, e.g., *Bartsch v Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 153 (2d Cir.), cert. denied, 393 U.S. 826 (1968) ("Wie einst in Mai" case). The conflict between the underlying copyright and the derivative copyright will usually also be a squabble over new markets brought by changing technology, but it need not be so. The tension between the preexisting copyright and the derivative copyright is at heart the tension created by the independent copyright of the derivative work. See, e.g., *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988), cert. denied, 109 S. Ct. 1135 (1989) (mounting of legally purchased prints on new medium infringement as unauthorized derivative work).

works that were already copyrighted.⁶³ More importantly for our analysis, the grant to works already copyrighted the right of termination under § 304(c), a grant from which control of derivative works was deliberately withheld, proves that Congress not only intended to, but did in fact, extend the new form of "second bite" protection to works already copyrighted. One cannot envision Mr. Abend, as proprietor of the underlying copyright, refusing to accept the extended period of protection afforded him by § 304(b) of the 1976 Act, a "windfall" of nineteen years of protection unanticipated by the original contracting parties. It seems wholly unjustifiable to allow Mr. Abend to take advantage of the extended period of protection afforded him under the new Act but to deny to Mr. Stewart et al. the protection accorded to them by the very same section. Thus, from both the standpoint of judicial consistency and fairness and from the standpoint of the manifest intent of Congress, the only legitimate position the Court was free to take was that Mr. Abend's attempt to control the disposition of "Rear Window" exceeded the scope of his copyright.⁶⁴

⁶³ 17 U.S.C. § 304 (1988).

⁶⁴ Another analysis which might have achieved the same result while staying truer to the law would have been to consider the movie itself an extant derivative work (hence outside the purview of Abend's copyright), but to have found the reproduction of the movie in video cassettes and video disks to constitute new, unauthorized derivative works because of the change in the media of reproduction. There is some support for this rationale in the Ninth Circuit's decision in *Mirage Editions, Inc. v. Alberquerque A.R.T. Co.*, in which the mounting of lawfully purchased artistic prints on ceramic tile for resale without the permission of the copyright holder was found to be an infringement because it was an unauthorized derivative work. *Mirage Editions, Inc.*, 856 F.2d at 1344. If the mounting of a print, lawfully obtained, on a different background can be seen to constitute an unauthorized derivative work, then one might find by extension that the duplication of a lawfully made derivative work in another medium, e.g., videocassette, is a new derivative work outside the original scope of the grant by the preexisting copyright holder. Such a decision would keep the decision squarely grounded in the arena of derivative works yet still give the Court a vehicle to reallocate the unanticipated profits attendant to the widespread distribution of home-video in the 1980s. The motion picture itself would, of course, remain free from the control of the underlying copyright holder in keeping with the mandate of the 1976 Act. Such an analysis does not, however, address the relative contributions made by the underlying copyright owner and the derivative copyright owner, which is one source for the unfairness one feels about the *Stewart* decision. It is this author's position, however, that it is not the relative merit of the contributions that is controlling, but the bare originality of the derivative work per se which secures for it freedom from termination.

Yet the majority was so anxious to avoid a meaningful discussion of the 1976 Act that it contrived to use *Miller Music Corp.* as the primary ground for its decision, a case which did not stop an author from selling his renewal interest but only stopped his prior sale from being effectuated upon his death. *Miller Music Corp.* cannot be understood without *Fred Fisher Co.*, as noted above.⁶⁵ But rather than recognizing *Miller Music Corp.* as the limited and supplementary holding that it was, the Court made it the centerpiece of its concatenation of extraneities. The Court's buttressing of *Miller Music Corp.* by the adduction of quotations from the late professor Nimmer and the legislative drafters of the 1909 Act, fearful that an author be deprived of his renewal interest, cannot be but disingenuous.⁶⁶ For had the Court ever actually wished to effectuate the two-tiered system of protection intended by Congress in the 1909 Act, it would never have decided *Fred Fisher Co.* as it did, and it would certainly have repudiated *Fred Fisher Co.* when the opportunity arose in *Miller Music Corp.*, by making the renewal period protection absolutely inalienable prior to its commencement. But that is exactly what the Court has never been willing to do. In the 1976 Act, Congress again attempted to reinstate the two-tiered system of protection by leaving behind the old renewal right analysis and forging a new method of protection, the right to terminate prior grants and assignments. It is certainly true that this new vehicle, the termination right, was primarily necessitated by the change in the duration of copyright protection under the 1976 Act. However, the legislative mandate that the right to terminate be absolutely inalienable prior to its effective date is a direct response to what the Court did in *Fred Fisher Co.* and *Miller Music Corp.*, and it makes the Court's protestations that Congress provided no support for the exclusion of derivative works from the "second bite" policy in the 1976 Act all the more hollow.⁶⁷ For at the same time that it reinstituted this

⁶⁵ See *supra* note 15.

⁶⁶ *Stewart*, 110 S. Ct. at 1759.

⁶⁷ *Id.* at 1763. "Accordingly, we conclude that neither the 1909 Act nor the 1976 Act provides support for the theory set forth in *Rohauer*. And even if the theory found some support in the statute or the legislative history, the approach set forth in *Rohauer* is problematic." *Id.* How far does this disdain for "problematic" legislation extend?

inalienable "second bite" for authors in the termination provisions, Congress expressly excepted derivative works from the reach of that right. Congress did speak in the 1976 Act with clarity; the majority of the Court simply chose not to listen.

Indeed, so unwilling or unable was the Court to put *Miller Music Corp.* in its proper legal, historical, and logical context that it actually held up *Miller Music Corp.* as dispositive of the issue, even though that case had absolutely nothing to do with derivative works. Having blithely concluded that *Miller Music Corp.* required that Stewart et al. negotiate with Abend because Woolrich died, the majority of the Court then opined that "[t]he reason our inquiry does not end here, and that we granted certiorari, is that the Court of Appeals for the Second Circuit reached a contrary result in *Rohauer v. Killiam Shows, Inc.* (citation omitted)."⁶⁸ One might add, if the point has not already been sufficiently made, that the Second Circuit reached a contrary result because Judge Friendly, rather than considering himself to be above the changes Congress wrought in the 1976 Act, sought to implement them.

B. *Rohauer*

The dispute in *Rohauer* arose out of the relationship between Edith Maude Hull's novel, "The Sons of the Sheik," and its lawfully made derivative work, a silent movie version of "The Sons of the Sheik," starring Rudolph Valentino.⁶⁹ After Mrs. Hull's death, her copyright in the renewal period was effected by her daughter, who then in turn assigned all rights accruing therefrom to plaintiff Rohauer.⁷⁰ Rohauer claimed, and the District Court held,⁷¹ that "upon the expiration of the original term of copyright. . . all rights of the defendants and their predecessors to authorize the exhibition of the motion picture terminated."⁷² In its opinion accompanying the reversal of the Dis-

⁶⁸ *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949 (1977).

⁶⁹ *Rohauer*, 551 F.2d at 486.

⁷⁰ *Id.*

⁷¹ *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 728 (S.D.N.Y. 1974).

⁷² *Rohauer*, 551 F.2d at 487.

trict Court's decision, the Second Circuit initially scrutinized the text of § 7 of the 1909 Act, which first provided express copyright protection for derivative works,⁷³ and the text of § 24 of the 1909 Act, the provision covering duration of protection and renewal, for some guidance in mediating the tension between owners of underlying copyrights and derivative copyrights.⁷⁴ Concluding that the legislative history of § 7 revealed little more than the two readily perceptible thoughts therein imbedded: first, that derivative works be given copyright protection in their own right, and second, that the derivative copyright not affect the validity of the underlying copyright,⁷⁵ the Second Circuit found nothing with any bearing on the question "how far an author's consent under the first clause of § 7 continues to authorize publication of the copyrighted derivative work during a renewal term of the underlying copyright secured by a statutory successor under § 24."⁷⁶

Judge Friendly then turned to an examination of the possibly relevant Supreme Court decisions, notably *Fred Fisher Co. and Miller Music Corp.*,⁷⁷ but it was obvious to him that "[a]ll these cases were concerned with the relative rights of persons claiming full assignment or ownership of the renewal right of an

⁷³ *Id.* It is true that there had been some antecedent protection for derivative works on a very limited scale in § 5 of the 1891 Copyright Act, 26 Stat. 1108, and in § 4 of the 1865 Copyright Act, 13 Stat. 540, and also to some extent in early case law, e.g., *Shook v. Rankin*, 21 Fed. Cas. 1335 (No. 12,804) (C.C.N.D. Ill. 1875); *Banks v. McDivitt*, 2 Fed. Cas. 759 (No. 961) (C.C.S.D.N.Y. 1875); *Gray v. Russell*, 10 Fed. Cas. 1035 (No. 5,728) (C.C.D. Mass. 1838), as Judge Friendly noted. *Rohauer*, 551 F.2d at 487.

⁷⁴ *Rohauer*, 551 F.2d at 487.

⁷⁵ The *Rohauer* court examined the volumes of the LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Brylawski & A. Goldman, eds. 1976), a set that only became available after the case had been argued, to refute an assertion made by The Author League of America as *amicus curiae* that the "force" of the renewal copyright includes the right to prevent any public exhibition for profit of the derivative work. The testimony of Mr. W.B. Hale of the American Law Book Co. before the joint House and Senate Committees on Patents on March 26, 1908, made clear, at least to the satisfaction of the Second Circuit, that the wording of this part of § 7 of the 1909 Act was designed to prevent the copyright in the preexisting work from being rendered void by failure on the part of the owners of the derivative copyright to observe the requisite statutory formalities. LEGISLATIVE HISTORY K78 (cited in *Rohauer*, 551 F.2d at 489).

⁷⁶ *Rohauer*, 551 F.2d at 490.

⁷⁷ He also considered *Fox Film Co. v. Knowles*, 261 U.S. 326 (1923) and *De Sylva v. Ballentine*, 351 U.S. 570 (1956). *Rohauer*, 551 F.2d at 490.

underlying copyright.”⁷⁸ None of them addressed the fundamental question: Does the renewed underlying copyright control an extant derivative work made prior to the renewal? Searching for guidance in what had thus been demonstrated to be a case of first impression, he looked to the 1976 Act and found in the termination provisions, both § 203(b)(1) and § 304(c)(6)(A), a policy determination by Congress that “the equities lie preponderantly in favor of the proprietor of the derivative copyright.”⁷⁹ Pointedly commenting on the wisdom of a dogmatic attempt to make prior but inapposite copyright cases controlling in subsequent diverse factual situations, he borrowed a quotation from a case decided in the Second Circuit in 1970,⁸⁰ when the 1976 Act was still in its incipient stages:

Our decision today is that the result which the proposed legislation would compel is not precluded in any way by the decisions rendered under the present Copyright Act. As discussed earlier, the “problem” with which the proposed legislation deals is one which exists because of judicial dicta rendered in cases not apposite to the factual situation before us in this case.⁸¹

Thus forced to consider the analysis set forth in *Rohauer* in order to discredit it, the Court in *Stewart* began its admonition of the Second Circuit as follows:

The Court of Appeals for the Second Circuit. . . shifted the focus from the right to use the preexisting work in a derivative work to a right inhering in the created derivative work itself. By rendering the renewal right to use the original work irrelevant, the court created an exception to our ruling in *Miller Music* and, as petitioners concede, created an “intrusion” on the statutorily created rights of the owner of the preexisting work in the renewal term. (citation omitted).⁸²

⁷⁸ *Rohauer*, 551 F.2d at 490.

⁷⁹ *Id.* Jaszi observed that “[f]aced with a novel issue, Judge Friendly proceeded to discount the views of most commentators, including Professor Nimmer, which supported the underlying copyright owner’s position. Jaszi, *supra* note 17, at 759. The result was a view which gave derivative works substantial independence.” *Id.*

⁸⁰ *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

⁸¹ *Goodis*, 425 F.2d at 403 (cited in *Rohauer*, 551 F.2d at 494).

⁸² *Stewart*, 110 S. Ct at 1761.

It is perhaps too much to say fairly of the *Rohauer* decision that it treated the renewal interest as "irrelevant." An ineffective assignment of the renewal interest has been the package, the vehicle, in which conflict between the expectations of the extant derivative copyright owner and the owner of the underlying copyright have arrived; both *Rohauer* and *Stewart* arose in the context of ineffective assignments of the renewal period. But this packaging is the direct result of the Court's holding in *Miller Music*, a case which was itself an exception to the unchallenged doctrine promulgated in *Fred Fisher Co.*, at least unchallenged until the 1976 Act, that Congress really didn't mean to make the renewal interest inalienable. At bottom, it was *Fred Fisher Co.* that was an exception to the "second bite" hypostasis of the two-tiered structure of protection that had characterized the Copyright Acts of the United States from 1790 to 1909. Had the Court in 1943, when it decided *Fred Fisher Co.*, honestly sought to consider the policy underlying the language under scrutiny, it would have refused to ratify any assignment of the renewal right prior to its effective date, the result that Congress achieved in the termination provisions of the 1976 Act. *Miller Music Corp.* was a ludicrously sophistical attempt by the Court some seventeen years later to cut back against the laissez-faire rationale of *Fred Fisher Co.*

But all of the compassion and concern the Court adduced in *Miller Music Corp.* for the families of deceased artists was equally well placed for living artists who had simply made bad deals.⁸³ Thus, *Miller Music Corp.* gave the Court a second opportunity to actively implement the "second bite" policy of the 1909 Act by making the renewal right inalienable prior to its effective date, and the Court again preferred to look the other way, settling instead for effectuating the policy of Congress only when an artist or author predeceased the renewal period.⁸⁴ It is against the backdrop of both *Fred Fisher Co.* and *Miller Music Corp.*, and the inconsistent treatment they accorded the con-

⁸³ A point noted by Justice Harlan in the dissent. "For it would indeed be anomalous to say that an author could convey for a consideration during his lifetime what he is not permitted to bequeath at his death." *Miller Music Corp.*, 362 U.S. at 381 (Harlan, J., dissenting)..

⁸⁴ *Id.* at 377-78.

gressional intent to safeguard an author's "second bite" cast in § 24 of the 1909 Act, that Congress expressly made the new right to termination utterly inalienable prior to its effective date in the 1976 Act.

But even more central to an understanding of why the Court's reliance on *Miller Music Corp.* was so very misplaced is that it is crucially dissimilar factually. *Miller Music Corp.* did not concern a derivative work at all. (Neither did *Fred Fisher Co.* for that matter.) The heart of the issue is that when one wishes to give an author a "second bite" at negotiation through a right that will come into being sometime in the future, there must be some provision made for derivative works that have already been legally made. Judge Friendly recognized that neither *Miller Music Corp.* nor *Fred Fisher Co.* could speak at all to the issue before him,⁸⁵ so he sought to balance the equities between the preexisting copyright owner whose labor and imagination produced the original work and the derivative copyright owner who has made her own independently copyrightable contribution.⁸⁶ He found, on balance, that the drafters of the 1976 Act had evidenced their intent that an extant derivative work be free from the control of the preexisting copyright owner under the termination provisions.⁸⁷ To frame the issue as one of renewal rights rather than one of conflict between the underlying copyright and the derivative copyright is to miss the mark completely, perhaps almost willfully.

Since the termination provisions are the new statutory successors to the renewal right, i.e., those provisions under the 1976 Act which safeguard the author's "second bite," Judge Friendly's analysis was more cogent, more current, and more relevant than that offered by the Court in *Stewart*. Despite the obvious conclusions that *Miller Music Corp.* could not possibly be dispositive because it did not deal with a derivative work, and that the 1976 Act had delineated the roles of underlying copyright and derivative copyright when the "second bite" is exercised, the Court still cleaved to *Miller Music Corp.*, *tabula ex*

⁸⁵ *Rohauer*, 551 F.2d at 490.

⁸⁶ *Id.* at 493-94.

⁸⁷ *Id.* at 494.

naufragio, ut ita dicam. Rather than praising Judge Friendly's perspicacity, the Court castigated him for making "an exception" to its ruling in *Miller Music Corp.*⁸⁸ (whatever that may mean when applied to a case that was clearly inapposite to begin with).

Believing that it had sufficiently repudiated *Rohauer*, the Court then adduced a series of make-weight citations to the late professor Nimmer⁸⁹, to *Russell v. Price*⁹⁰, to *Harper & Row, Publishers, Inc. v. Nation Enterprises*⁹¹, to *Gilliam v. American Broadcasting Cos.*⁹², and to Barbara Ringer, the former Register of Copyrights,⁹³ which do not concern the relationship between the preexisting work and the extant derivative work in a renewal or termination, but rather are general descriptions of the broad principle, underlying both § 7 of the 1909 Act and § 103(b) of the 1976 Act, that the derivative copyright owner acquires no rights in the preexisting work. Of course, none of these authorities stands for the proposition the Court announced in *Stewart*, that the preexisting copyright owner acquires control of the derivative work after an ineffective assignment of a renewal interest.⁹⁴

Having set the stage with these irrelevancies, the Court turned to address the fundamental issue⁹⁵. In response to the assertion that the termination provisions provide guidance as to the intent of Congress about the relationship between preexist-

⁸⁸ *Stewart*, 110 S. Ct. at 1761.

⁸⁹ 1 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 307[A] at 3-23 to 3-24 (1990) (cited by the Court in *Stewart*, 110 S. Ct. at 1761).

⁹⁰ *Russell v. Price*, 612 F.2d 1123 (9th Cir. 1979) (cited by the Court in *Stewart*, 110 S. Ct. at 1761).

⁹¹ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (cited by the Court in *Stewart*, 110 S. Ct. at 1761).

⁹² *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976) (cited by the Court in *Stewart*, 110 S. Ct. at 1761).

⁹³ B. RINGER, RENEWAL OF COPYRIGHT (1960) (cited by the Court in *Stewart*, 110 S. Ct. at 1762).

⁹⁴ How much control *Stewart* conveys to the preexisting copyright owner is in doubt. The broad language that the Court used to justify its decisions, for the most part taken from explanations of the meaning of § 7 of the 1909 Act and §103(b) of the 1976 Act, seems to give the preexisting copyright owner an absolute veto. But later in the opinion the Court seems to imply that it contemplates a negotiation between the litigants. *Stewart*, 110 S. Ct. at 1764.

⁹⁵ *Id.* at 1762.

ing copyrights and derivative copyrights, the Court pronounced § 304(c)(6)(a) to be the result of legislative compromise, again citing to former Register Ringer.⁹⁶ The Court did not include in its analysis the other, more generally applicable termination provision, § 203(b)(1), which might have subverted the Second Circuit's conclusion. Yet it is difficult to ascertain why a piece of legislation is disreputable and undeserving of implementation, simply because it is the result of compromise.⁹⁷ The Court then used the "plain language" of § 304(c)(6)(A) itself to bring the derivative work within the ambit of control of the preexisting copyright holder with some analytical legerdemain that is simply too subtle for this author to understand:

Congress would not have stated explicitly in § 304(c)(6)(A) that, at the end of the renewal term, the owner of the rights in the preexisting work may not terminate use rights in existing derivative works unless Congress had assumed that the owner continued to hold the right to sue for infringement even after the incorporation of the pre-existing work into the derivative work.⁹⁸

What this sentence means and how it permits the Court to ignore the explicit statements of Congress that it contains are two questions that this author cannot fathom. Nonetheless the Court was satisfied enough with its analysis to conclude the 1976 Act did not provide support for the theory set forth in *Rohauer*,⁹⁹ a proposition which is simply untenable if one reads the texts of §

⁹⁶ Ringer, *First Thoughts on the Copyright Act of 1976*, 13 COPYRIGHT 187 (1977). There can be no doubt that the 1976 Act was a series of compromises. See, e.g., Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (stating that 1976 Act was series of compromises among industries with differing interests in copyright). But what need is there for recourse to legislative history when the statutory language is clear on its face? If one were to adopt the theory of legislation the Court offers here, one could never really give force to any legislation that did not pass unanimously.

⁹⁷ The Court concludes its characterization of § 304(c)(6)(A) with a quotation from Litman, *supra* note 96, at 865-68. "Thus, there is no evidence whatsoever of what members of Congress believed the language to mean." *Stewart*, 110 S. Ct. at 1763. One is all the more incredulous that the Court would hold up its finding of an inconsistent legislative history to justify ignoring the plain meaning of the statutory language.

⁹⁸ *Stewart*, 110 S. Ct. at 1763.

⁹⁹ *Id.*

203(b)(1) or § 304(c)(6)(A). It had been clear from the outset of the opinion that the Court was not going to follow the theory set forth in *Rohauer*,¹⁰⁰ but the conclusion that the 1976 Act does not support that theory is a conclusion that any unbiased interpreter who gives the 1976 Act a fair reading cannot countenance, for it is simply not true. The 1976 Act virtually requires the theory set forth in *Rohauer*, whether one likes it or not.

C. *The Spectrum of Derivative Works*

Thus, the Court reached its decision by making *Miller Music Corp.* dispositive of the issue, even though it did not concern the relationship between an underlying and a derivative copyright, and by unabashedly mischaracterizing the clear import of the termination provisions in the 1976 Act. The obvious question is why. Some intimation of the Court's motivation may be found in its offhand admission that:

[E]ven if the theory found some support in the statute or the legislative history, the approach set forth in *Rohauer* is problematic While the result in *Rohauer* might make some sense in some contexts, it makes no sense in others. In the case of a condensed book, for example, the contribution by the derivative author may be little, while the contribution by the original author is great. Yet, under the *Rohauer* "rule," publication of the condensed book would not infringe the preexisting work, even though the derivative author has no license or valid grant of rights in the preexisting work. (citations omitted). . . . Thus, even if the *Rohauer* "rule" made sense in terms of policy in that case, it makes little sense when it is applied across the derivative works spectrum. . . .¹⁰¹

Even if this concern about the uniformity of application across the spectrum of derivative works is a valid one, and we shall endeavor to ascertain that presently, it is a bit tardy. Congress did not qualify the derivative works exceptions to termination in §§ 203(b)(1) and 304(c)(6)(A) to include only motion pictures. Derivative works as defined in §101 include translations, ar-

¹⁰⁰ See *supra* note 47 and accompanying text.

¹⁰¹ *Stewart*, 110 S. Ct. at 1763.

rangements, abridgements and condensations.¹⁰² They all are exempted from control of the underlying copyright during termination of prior grants and assignments.

Even the hypothetical illustration of the condensed book that can continue to be marketed without consent of the underlying copyright owner, an illustration which seemed to frighten the Court so terribly, is not an open question under the 1976 Act. Unless the Court is willing to ignore the text of the 1976 Act, there is no doubt that it can be so marketed. Until Congress changes either the definition of a derivative work or the wording of §§ 203(b)(1) and 304(c)(6)(A), the conclusion is inescapable. Yet the Court's obvious displeasure at the derivative work abroad and unleashed, as it were, makes one wonder whether the Court would actually effectuate the clear instructions of Congress, were a case squarely under § 203(b)(1) or § 304(c)(6)(A) to manage judicial review.

In its reasoning, the Court in *Stewart* often relied on the general delineation of the rights of the preexisting copyright owner and the rights of the derivative copyright owner in § 103(b) of the 1976 Act:

The copyright in a compilation or a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, [sic] any copyright protection in the preexisting material.¹⁰³

The Court's position seemed to be, and one must guess for it was never clearly stated, that since the derivative copyright extends only to the new material contributed by the derivative author, and since the derivative copyright doesn't "imply any *exclusive* right in the preexisting material" (emphasis added), then the derivative work cannot be permitted to be marketed without the consent of the underlying copyright owner after a failed as-

¹⁰² 17 U.S.C. § 101 (1988).

¹⁰³ 17 U.S.C. § 103(b) (1988).

signment of the renewal interest. Unfortunately, § 103 does not reach the concepts of duration of copyright or termination of prior grants or assignments, also fundamental concepts at issue before the Court in *Stewart*.

Recourse to the legislative history of § 103 reveals six directives from the Senate and House Judiciary Committees' Reports to explain the purpose and function of § 103: (1) that the compilation or derivative work meet both the subject matter requirement and the original work of authorship requirement of § 102; (2) that copyright in the new version cover only the material added by the later author; (3) that copyright in the new version have no effect one way or the other on the copyright status or public domain status of the preexisting work; (4) that the terms "compilation" and "derivative work" comprehend every copyrightable work which incorporates preexisting material; (5) that an unlawful (infringing) compilation or derivative work not be accorded protection; (6) and that using preexisting material without permission not necessarily render a derivative work unlawful because some uses without permission are fair uses.¹⁰⁴ Of these factors it is only the second, that the copyright in the new version cover only the material added, that concerns our investigation. For it was both the language of § 7 of the 1909 Act and the language of § 103(b) that the Court adduced to substantiate its conclusion that neither copyright act supported freeing extant derivative works from the underlying copyright.¹⁰⁵ But the proposition that copyright in a derivative work may not extend to any portion of the underlying copyright is not the same as the proposition that an extant derivative work be subject to reversion or termination. Yet the Court in *Stewart* has assumed that those two propositions are identical. Section 103(a) makes clear that any derivative work employing preexisting material unlawfully will not be protected under Title 17. Therefore, any lawfully made derivative work must either be made with the preex-

¹⁰⁴ S. REP. NO. 473, 94th Cong., 1st Sess. 54-55 and H.R. REP. NO. 1476, 94th Cong., 2d Sess. 57, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5670-71. Since the House Report adopted the language of the Senate Report concerning § 103 verbatim, there was no need for a discussion of it in the Conference Reports.

¹⁰⁵ *Stewart*, 110 S. Ct. at 1761-62.

isting copyright owner's permission or be a fair use.¹⁰⁶ For lawfully created derivative works, the drafters of the 1976 Act found themselves on the horns of a dilemma: they could include derivative works within the ambit of the termination provision, a decision that would deny authors of derivative works continued use of their labor, or they could exempt derivative works from the ambit of the termination provisions, a decision that would deny to the underlying authors some measure of the value of the underlying work.¹⁰⁷ They chose the latter alternative, primarily, as the Court correctly noted in *Stewart*, because the legislation was the product of compromise.¹⁰⁸ But they did not make the derivative work exception absolute. The derivative work may only continue to be used in a manner consistent with the original grant.¹⁰⁹

As early in the process of copyright law revision as 1961,¹¹⁰ the Register of Copyright noted that the original purpose of the reversionary interest had "been thwarted to a considerable extent,"¹¹¹ with the practical effect that "[a] considerable amount of trafficking in the possible future renewal right of authors and their respective heirs has grown up."¹¹² The Register's report opined that "[i]nstead of the present reversion of the renewal right, we believe that some other provision should be made to permit authors and their heirs to negotiate their assignments in certain situations."¹¹³ But the report also speculated whether this new scheme might make "publishers, motion picture producers, and other users who need assurance of continued use for an extended period" reluctant to use the work.¹¹⁴

By 1964, the third committee print prepared for the House Committee on the Judiciary contained a preliminary draft of a

¹⁰⁶ See *infra* note 137 for the text of § 107.

¹⁰⁷ H.R. REP. 1476, *supra* note 4, at 127, 141.

¹⁰⁸ See *infra* text accompanying note 119.

¹⁰⁹ 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (1988).

¹¹⁰ REGISTER OF COPYRIGHTS, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE COPYRIGHT LAW (87th Cong., 1st Sess., Comm. Print 1961), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed.).

¹¹¹ *Id.* at 53.

¹¹² *Id.*

¹¹³ *Id.* at 55.

¹¹⁴ *Id.* at 54.

new copyright title and comments thereon.¹¹⁵ The preliminary draft of § 16, Limitations on Transfers of Copyright Ownership, contained two alternative proposals,¹¹⁶ one which included a mandatory reversion of all interests after twenty-five years but exempted derivative works from the reversion,¹¹⁷ and one which allowed a court proceeding to reform the contract of assignment after twenty-five years if the present value of the work was "strikingly disproportionate" to the amount originally paid the

¹¹⁵ STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (Comm. Print 1964).

¹¹⁶ *Id.* at 15-16.

ALTERNATIVE A

§ 16 Limitations on Transfers of Copyright Ownership

(a) In the case of any work other than a work made for hire, a transfer by the author after the effective date of this act, otherwise than by will, of copyright or any exclusive right under a copyright shall be effective for no more than twenty-five years from the date of its execution. Notwithstanding any agreement to the contrary, at the end of said twenty-five year period the right or rights transferred shall revert to the author, or if he is dead, to his legal representatives, legatees, or heirs at law.

(b) As an exception to the provisions of subsection (a), a derivative work prepared under the authority of a terminated transfer may, despite the reversion of rights, continue to be utilized under the terms of said transfer; however this privilege shall not extend to the making of other derivative works employing the work covered by the terminated transfer.

ALTERNATIVE B

§ 16 Limitations on Transfers of Copyright Ownership

(a) If, at the end of twenty years following the execution by the author, after the effective date of this act, of a transfer of copyright or of any exclusive right under a copyright, the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the author or his successors, action may be brought in any court mentioned in section 1338 of Title 28 to reform or terminate said transfer.

(b) Such action may be filed by the author or, if he is dead, by his legal representatives, legatees, or heirs at law, within three years after said twenty year period, and this right of action cannot be waived in advance. In such action the plaintiff shall have the burden of proving that, taking into consideration all factors, including the bargaining position of the parties, their respective contributions to the success of the work, and changes in business practices or media of exploitation, the terms of the transfer have proved to be unfair or grossly disadvantageous to the author. The court shall decide the action in accordance with the principles of equity, and shall have discretion to reform or terminate the transfer on whatever terms it considers reasonable and just.

¹¹⁷ *Id.* at 15 (Alternative A).

author but did not exempt derivative works.¹¹⁸ Then Assistant Register of Copyrights (later to become Register) Barbara Ringer explained the arguments of those critical of the contemplated termination provisions and those who supported them, and she set forth the position of the Copyright Office on the new language:

Aside from the arguments based on the nature of copyright as property and the inviolability of contracts, the fundamental arguments that have been lodged against the proposal are three:

First, that authors, if they ever were, are no longer in a weak bargaining position and need no special protection of the sort contemplated here;

Second, that users such as motion picture producers and book publishers (to name two of many), contribute a great deal themselves to the success of a work and assume considerable economic risks and losses which the author does not; the argument goes that they should not be placed in the position of losing their property after any period and that, in any case, twenty years is not long enough for them to recoup their investment;

Third, that the proposal would cloud the title of a number of copyrights and make them less valuable.

On the other side (represented primarily by author groups, of course) it has been argued that the proposal made in the report, limiting the reversion to cases where the transfer is not based on continuing royalties is illusory since the royalties could be nominal and the proposal could easily be evaded.

We are fully conscious of the difficulties of providing a standard for continuing royalties that would not lead to evasion on the one hand or, on the other hand, to so many doubts that the titles to copyrights would be clouded and their value diminished. For these reasons we decided to drop the royalty distinction for the purposes of this draft.

Instead, as you will note in Alternative A, we have done two things in an effort to answer at least some of the users' arguments. First, (and this may seem pretty small potatoes), we have lengthened the 20 year period to 25 years. Second, we added a provision, which I think is probably quite important

¹¹⁸ *Id.* at 16 (Alternative B).

here, that would permit the owner of a derivative work, such as a motion picture, to continue using it.¹¹⁹

The text of § 16 of the discussion draft did not single out motion pictures as the only derivative works to be excepted from the termination provisions. That Assistant Register Ringer chose to illustrate the purpose of the section with the words "such as a motion picture" cannot be taken but as explanatory of the concept of a derivative work. Even if movies were foremost on the minds of the drafters when considering the balance between underlying and derivative copyright, and the testimonial evidence suggests that it was so,¹²⁰ they did not choose to limit the applicability of the termination provisions only to movies. Her comments were illustrative and not exhaustive, else the drafters would have had to use the words "motion picture" in place of the broader "derivative work."

What, then, of the Court's contention that the theory set forth in *Rohauer*, a theory required by a fair reading of the termination provisions, makes sense in some contexts and not in others?¹²¹ The first and most obvious conclusion is that motion pictures are, if the discussions which led to the 1976 Act are to have any bearing on the matter, exactly the "context" expressly considered by the drafters for exemption from the control of the underlying copyright upon termination. (So much for the Court's conclusion that the 1976 Act did not contemplate freeing a motion picture from the control of the underlying copyright; it is simply error.) But movies are not the only context. The definition of "derivative work" comprehends a wide territory. Translations, compilations, all manner of reworkings of previous material fall under the category of "derivative work."¹²²

But the question anterior to the timing of the Court's "spectrum of derivative works" argument is the validity of that argument. Is the statutory exemption of extant derivative works from the control of the underlying copyright, something that in the words of the Court, "makes sense in some contexts" and "no

¹¹⁹ *Id.* at 277-78.

¹²⁰ *Id.*

¹²¹ *Stewart*, 110 S. Ct. at 1763.

¹²² 17 U.S.C. § 101 (1988).

sense in others"?¹²³ Assuming *arguendo* that the Court could legitimately pretermitt the express language of the termination provisions that allows all extant derivative works to continue to be used after termination, in order to develop some kind of case-by-case treatment for them, what kind of criteria would it employ in the analysis? A motion picture is perhaps the strongest case for the exemption, since it is the example of a derivative work offered by the legislative history.¹²⁴ The obvious factors which militate for keeping "Rear Window" free from control by Abend (apart from the intent of the contracting parties, the legislative history, and the express statutory language of the 1976 Act) are the vast disparity between the production cost of the movie and that of the story; the quanta of originality added by the contributions of director, actors, set designer, editors, etc.; and the greater value accorded to the picture by society, whether measured in popularity or profitability.

Of course, such a high degree of originality will not be present in every derivative work. One can easily imagine (or watch for that matter) a movie made on a shoestring budget, to which the cinematographers and actors added next to nothing and which, resultingly, was neither as popular nor as profitable at the box office as the best-seller on which it was based. Yet even a low-budget, hackneyed flop, if legally made with the permission of the underlying copyright owner, is entitled to independent copyright under § 103(a) as long as it meets the § 102 requirements of copyrightable subject matter in an original work of authorship. (One may assume for the purpose of the question before us that we do not have a problem with copyrightable subject matter.)¹²⁵ The crucial questions, then, are what is the requisite quantum of originality in a derivative work to trigger pro-

¹²³ This theory seems to have been urged on the Court by Jaszi, *supra* note 17. Both Justice White in his dissent in *Mills Music, Inc. v. Snyder*, 496 U.S. 153, 183 n.8, and Justice O'Connor for the majority in *Stewart*, 110 S. Ct. at 1763, cite to *When Works Collide* with approbation.

¹²⁴ See, e.g., STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THAT DRAFT 277-300 (Comm. Print 1964).

¹²⁵ We assume for the purposes of this discussion that works unable to pass the § 102 threshold of copyrightable subject matter have been eliminated on that basis.

tection, and does that quantum vary as the medium of tangible expression, that is, vary across the "spectrum of derivative works," to use the Court's terminology.

Justice Holmes long ago admonished those jurists who would see themselves as arbiters of the value of works of art, although his words were elicited by controversy over an original and not a derivative copyright:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which the author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.¹²⁶

The solution to the problem of differing views of art or merit is to make the threshold of originality necessary for a work to be considered "an original work of authorship" a small one. This in fact, seems to be the position that the courts have taken in the twentieth century for the most part when asked to decide whether a work was sufficiently "original" to be protected.¹²⁷ The question of originality in a derivative work is naturally a bit more complex, since there is by definition a preexisting work

¹²⁶ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

¹²⁷ See, e.g., *Italian Book Co. v. Rossi*, 27 F.2d 1014 (S.D.N.Y. 1928), in which a sailor copyrighted his version of an old folk tale and was protected from the defendant's appropriation of his version. See also, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), in which defendant's copying of plaintiff's mezzotint plates of eight old masterpieces in the public domain was held infringing. But see Judge Posner's remarks in *Gracen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983) (the Wizard of Oz plate case), implying a different quantum of originality necessary for derivative works than that needed for an original work.

that has played a part in the formation of the derivative work.¹²⁸ If one makes the quantum of originality necessary for a derivative work to garner protection a small one, doesn't one cut into the rights of the preexisting copyright owner? The answer is no more so than occurred when the preexisting copyright owner granted permission to the author of the derivative work to use the preexisting work.¹²⁹ The right to the continued use of the derivative work is not dependent on the degree of originality of that derivative work (assuming, of course, that the minimal requisite quantum to come within Title 17 is present, whatever that may be), but only on the fact of its originality. Once the derivative work has been granted protection, that is, once one is satisfied that the derivative work is an original work of authorship lawfully made, one need not ascertain whether it is a famous work by Alfred Hitchcock, starring Jimmy Stewart and Grace Kelly, or whether it is an uninspired, forgettable knock-off.

It may well be at base some innate, Lockean notion of the right to one's labor operative in the minds of people when they contemplate intellectual property that generated the dissatisfaction with the outcome of *Fred Fisher Co.* and *Miller Music Corp.*, and which prompted the drafters of the 1976 Act to reinstate the inalienable "second-bite" of the termination provisions in derogation of the judge made law on the subject. Indeed, it may also have been this "labor theory" which spurred Congress to protect derivative works independently of the preexisting work in 1909 in the first place.¹³⁰ But the decision to include or to exclude a derivative work from the effect of termination of prior grants (or of ineffective assignment of a renewal interest) cannot be made to depend on the relative value of each author's respective labor, at least not without triggering those insoluble biases of taste, time, and class that Holmes took pains to warn us of in *Bleistein*. For this reason, one might dare to suggest, a

¹²⁸ 17 U.S.C. § 103(a) (1976).

¹²⁹ Derivative works which use preexisting works without permission but in a way that is fair use are more difficult for contractual analysis since the original author never agreed to the subsequent use of her work. Yet if the use should be found to be fair use, there can be no infringement.

¹³⁰ But see Justice Frankfurter's discussion of the development of the renewal right in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647-56 (1943).

scheme of compulsory arbitration between original and derivative copyright owners upon termination, had Congress seen fit to create one, would likely fail. It is not the relative value of the derivative work that either wins the day to free the derivative work from the preexisting copyright or loses out to the overwhelming creative vitality of the original work to doom the derivative work forever to be merely an appendage of the original. It is the fact of the lawful creation of the derivative work itself in sufficient originality to satisfy §§ 102 & 103, and nothing more. It is the recognition that a work, once made, cannot be undone. This has to be so whether the derivative work is a movie, a translation, a phonorecord, a computer program, or a plastic toy in the likeness of Mickey Mouse.¹³¹ Proof for this analysis is furnished by the distinction drawn by the drafters of §§ 203(b)(1) and 304(c)(6)(A). Extant derivative works may continue to be used according to the terms of the grant even after the termination, "but this privilege does not extend to the preparation after termination of other derivative works based upon the copyrighted work covered by the terminated grant."¹³² The distinction is that drawn between potentiality and actuality, between intention and existence. It is the fact of the labor of the derivative artist, assuming always, of course, that there is present the minimum originality that is statutorily required, and not its quality or quantity that exempts the derivative work from termination.

Neither does the right of the derivative author to protection from termination vary with the contractual arrangement between the parties. The drafters of §§ 203(b)(1) and 304(c)(6)(A) provided that the lawfully prepared derivative work may continue to be used *under the terms of the grant after its termination*.¹³³ Thus, both parties are held to the bargain struck at the time permission was granted to create the derivative work. The derivative author is not then free to escape whatever royalty payment she contracted for on the front end, but neither is the preexisting author allowed to change the terms of the agreement

¹³¹ *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980).

¹³² 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (1988).

¹³³ *Id.*

because of the success of the derivative work.¹³⁴ Is this statute only inappropriate for certain classes of original works and derivative works? Does it not fairly identify and apportion the conflicting interests between a song-writer and the owners of a t.v. commercial using that song, between the author of a computer program and the author of an enhancement to it, between the owners of the likeness of Bart Simpson and the toy manufacturer who makes the Bart doll? The overarching principle is that once the derivative work has been made, it is no longer simply the preexisting work and may not, therefore, be affected by termination. But at the same time, neither is it free of the terms of the original grant.

D. Fair Use

After a brief, anticipatory repudiation of the statutory analysis question raised by the dissent,¹³⁵ the majority then turned to address the petitioner's claim that the continued use of "Rear Window" was fair use.¹³⁶ The majority sustained the Ninth Circuit's conclusion that the use was not fair, because "[t]he motion picture neither falls into any of the categories enumerated in § 107 nor meets the four criteria set forth in § 107."¹³⁷

Of course, the categories in § 107 are illustrative and not

¹³⁴ As noted above, the analysis is a bit more labored when the derivative work was made without permission but under fair use.

¹³⁵ See *infra* discussion under section III E.

¹³⁶ *Stewart*, 110 S. Ct. at 1768.

¹³⁷ 17 U.S.C. § 107 (1988):

Limitations on Exclusive Rights: Fair Use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

exhaustive,¹³⁸ but the Court's position was essentially correct, because commercial use without some public benefit is generally not fair use, especially where there has been a history of prior use for compensation.¹³⁹ There is some authority in the *Sony* case that some "non-productive" uses are still fair uses.¹⁴⁰ All in all, however, it would be hard to suggest movie-making for profit as representative of the kinds of activities on the minds of the drafters without raising a few eyebrows.

The Court's application of the four § 107 criteria was perhaps more open to dispute. It is the fourth factor, the effect on the potential market or value of the copyrighted work, which has emerged as the most important factor.¹⁴¹ It is not stretching the truth to say that without "Rear Window" there was no market for "It Had to Be Murder," that in fact, the sole reason that Abend realized anything from his investment was because of the continued use of "Rear Window." Thus, from one standpoint, the "unpermitted" use only increased the value of the underlying work from nothing to something.¹⁴² Even if this analysis comes close to delineating the real market forces at work, it is still not surprising that the Court preferred to find that "[t]he record supports the Court of Appeals' conclusion that re-release of the film impinged on the ability to market new versions of the story."¹⁴³

But the petitioner's assertion was not without merit, even if it was ineffective. Everything that could have been done contrac-

¹³⁸ See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 477-81 (1984) (Blackmun, J., dissenting, succinctly discusses the general development of the doctrine of fair use).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 447-52. Justice Stevens for the majority opined that "[a]lthough not conclusive, the first factor requires that 'the commercial or nonprofit character of an activity' be weighed in any fair use decision." *Id.* at 448-49, and thus refused to recognize the productive vs. nonproductive distinction that the dissent urged on the Court.

¹⁴¹ See, e.g., *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985), "This last factor is undoubtedly the single most important factor of fair use." (footnote omitted).

¹⁴² Indeed, since his \$650 investment in 1971, Abend has already received \$3,000 for the rights to make another film of the short story, \$7,500 from book publishing, and he admitted timing the republication of the short story to coincide with the film's rerelease. PETITIONER'S BRIEF, n.57 (citing to pages 87 & 92 of the Record), LEXIS screen 63.

¹⁴³ *Stewart*, 110 S. Ct. at 1769.

tually to secure the renewal period had been done at the time of the assignment. Petitioners lost the underlying copyright through operation of law after they had legally produced the movie. Their use of the story was not through an implied consent, but through an express consent of the author. It would, perhaps, be doing less violence to the law to find fair use for an extant derivative work after an ineffective assignment that both parties intended than to put control of the derivative work in the hands of the underlying copyright owner. But, of course, had the Court given a fair reading to the 1976 Act, the fair use argument would never have been reached.

E. The Dissent

Justice Stevens, with whom the Chief Justice and Justice Scalia joined, found in his reading of § 7 of the 1909 Act support for a separate and distinct identity for the derivative work. "The plain language of § 7 confers on the entire derivative work—not just the new material contained therein—the status of all other works of authorship, that of 'new works subject to copyright under the provision of this title.'"¹⁴⁴ Tracing the legislative history of the 1909 Act,¹⁴⁵ the dissenting minority observed:

The legislative history confirms that the copyright in derivative works not only gives the second creative product the monopoly privileges of excluding others from the unconsented use of the new work, but also allows the creator to publish his or her own work product. The authority to produce the derivative work, which includes creative contributions by both the original author and the second artist, is dependent upon the consent of the proprietor of the underlying copyright. But once that consent has been obtained, and a derivative work has been created and copyrighted in accord with that consent, "a right of property springs into existence," (citation omitted). . . . The original copyright may have relatively little value because the creative contribution of the second artist is far more significant than the original contribution, but that just means that the rewards for creativity are being fairly allocated between the two

¹⁴⁴ *Id.* at 1770.

¹⁴⁵ *Id.* at 1772-75.

artists whose combined efforts produced the derivative work.¹⁴⁶

The dissent then turned to a discussion of § 24 of the 1909 Act and found it subordinate to § 7.¹⁴⁷ Characterizing the majority's reliance on *Miller Music Corp.* as a "critical flaw in the Court's analysis,"¹⁴⁸ Justice Stevens opined that the same separation from the preexisting work that he gleaned from § 7 is operative in § 304(c)(6)(A) of the 1976 Act.¹⁴⁹

While one would like to laud the dissenters for their desire to keep the "Rear Window" free from Abend's speculative meddling, it is difficult to do so on the rationale set forth to justify their conclusion. Justice Stevens reached a result more consistent with the law as it is embodied in the 1976 Act than did the majority, but his rationale paid no heed to the limitation on the derivative authors that the termination provisions also provide. That limitation is that the derivative work continue to be used according to the terms of the original grant.¹⁵⁰

The dissent erred on the other side of the question, so to speak, by failing to recognize that the law, especially the 1976 Act, has to have some method of securing for the underlying copyright owner unimagined markets and unanticipated uses that she did not mean to bargain away when she gave permission for the derivative work to be created. This conditioning of the independence of the derivative work on its continued usage according to the terms of the original grant is manifest in the termination provisions. It was the result that Judge Friendly reached in *Rohauer* when he extended the rationale retroactively to works governed by the 1909 Act. It was the position characterized by one commentator in 1981 as an "accommodation" both "necessary and desirable."¹⁵¹ It is the position that the Court should have taken to decide *Stewart*. The difference be-

¹⁴⁶ *Id.* at 1775.

¹⁴⁷ *Id.* at 1777. "Unless § 24 is to overwhelm § 7, the consent of the original author must be given effect whether or not it intrudes into the renewal term of the original copyright." *Id.*

¹⁴⁸ *Id.* at 1778.

¹⁴⁹ *Id.* There is a typographical error in the *Supreme Court Reporter* version of the opinion. "Section 101(c)(6)(A)" is printed instead of § 304(c)(6)(A).

¹⁵⁰ 7 U.S.C. §§ 203(b)(1) & 304(c)(6)(A) (1988).

¹⁵¹ Ellingson, *supra* note 17 at 41.

tween the majority and the minority should have been only the difference between those who think that the "windfall" of video sales falls within the grant from Woolrich to De Sylva and those who do not.

Moreover in 1986, two years before *Stewart* managed to wind its way to the Supreme Court, Richard Colby published an article in the *Pepperdine Law Review* in which he specifically set forth the narrow issue presented by *Stewart* and reviewed in depth the legal theories that were possibly relevant.¹⁵² Colby concluded:

that the judgment in *Rohauer* was correct and fully consistent with copyright theory and, rather than having been an aberration, was a reconfirmation of copyright in derivative works, reflecting a proper and a fair use of the underlying literary work upon which the derivative work is based, both under section 7 of the 1909 Act and the more specific provisions of section 306(c)(6)(A) of the 1976 Act as analyzed by Judge Friendly in *Rohauer*, in determining the intent of Congress when it passed the 1909 Act.¹⁵³

The Court did not make reference to Colby's scholarship in its opinion.¹⁵⁴ It is, perhaps, too much to expect that the Court would have been swayed by Professor Colby's detailed exposition of the relevant history and law, but surely the Court should have been able to decide the question straightforwardly on the grounds of derivative works, rather than harping back to the obsolescent renewal interest analysis.

IV. CONCLUSION

The Court's decision in *Stewart* was a mistake that until it is reversed will plague the law of copyright. It perpetuates unnecessarily a dichotomy of treatment between derivative works created under the 1909 Act and those created under the 1976 Act. But even more egregious than reaching an incorrect result

¹⁵² Colby, *supra* note 10.

¹⁵³ *Id.* at 571-72 (footnotes omitted).

¹⁵⁴ We do know that the Petitioners made the Court aware of the Colby article in their Reply Brief. PETITIONER'S REPLY BRIEF, LEXIS screen 4.

was the Court's failure to address the fundamental problem on its own terms. Virtually none of the discussion in *Stewart* will be useful to those attempting to chart a course through the troubled waters of derivative works, as it were, because the Court did not come to grips with basic tension that arises when one copyrighted work is used to produce another or the balance struck by the 1976 Act to mediate that tension.

SUNSHINE IN MISSISSIPPI: THE OPEN MEETINGS ACT

*Leonard Van Slyke**

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INTRODUCTION

"A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both."¹

Deeply imbedded in our Anglo-American principles of democratic government is the idea that the processes of government should be open to public scrutiny. When James Madison wrote of the philosophy of open meetings, he recognized a tenet of American government as historic as the New England town meetings. Only in relatively recent times has the principle been codified into legislation by the states.² Mississippi citizens had to wait until 1975 before the legislature affirmed their right to attend the meetings of public bodies by passage of the Open Meetings Act.³ The Mississippi Supreme Court, however, has

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¹ THE WRITINGS OF JAMES MADISON 103 (Hunt ed, 1910). In a letter to W.T. Barry August 4, 1822, James Madison approved of liberal appropriations by the Legislature of Kentucky for a general system of education. *Id.* Mr. Madison further stated that "knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.*

² Comment, *Common Cause v. Utah Public Service Commission - The Applicability of Open-Meeting Legislation to Quasi Judicial Bodies*, 4 UTAH L. REV. 829 (1980) (authored by Laurie A. O'Connell). Utah passed the first open meeting law in 1898 which was codified at 1989 UTAH LAWS § 202. *Id.* Currently every state and Congress have enacted some form of open meeting statutes. *Id.* at 830.

³ MISS. CODE ANN. §§ 25-41-1 through -17 (Supp. 1989). The Code provides for open meetings to facilitate public awareness of the performance of public officials and the deliberations that evolve into public policy. *Id.*; see also MISS. CODE ANN. § 25-41-3

made up for time lost by its vigorous enforcement of the Act, and its recognition of the time-honored principles that led to its passage.⁴

The purpose of this article is to update the reader on the current status of the Open Meetings Act, including the interpretations placed upon it by the recent decisions of the Mississippi Supreme Court. Additionally, the article will discuss the court's most recent pronouncement on the Act in the case of *Hinds County Board of Supervisors v. Common Cause of Mississippi*,⁵ and the far-reaching effects that decision will have on enforcing the terms of the Act. Finally, the authors will give some practical tips, based on their representation of members of the press and public seeking to attend public meetings, on how to successfully invoke the Open Meetings Act to gain access to meetings of public bodies.

I. BACKGROUND AND HISTORY OF OPEN MEETING LAWS

A. *In the United States*

Public meeting and record statutes, also commonly known as "freedom of information acts," "sunshine laws" or "right to know laws," have now been enacted by all fifty states.⁶ Open meetings laws sprang up as a result of public dissatisfaction with the secrecy that surrounded the meetings of government bodies. Utah passed the first open meetings law in 1898; by 1959, twenty states had enacted such laws.⁷ The sentiments that led to the

(Supp. 1989); Miss. CODE ANN. § 25-41-5, -7, -9, -11, -13, -15, -17 (Code sections 24-51-3 through -17 provide framework of Open Meetings Act).

⁴ See *Hinds County Bd. of Supervisors v. Common Cause of Miss.*, 551 So. 2d 107, 125 (Miss. 1989) (act is to be "strictly construed against executive sessions"); *Board of Trustees v. Mississippi Publishers Corp.*, 478 So. 2d 269, 273-78 (Miss. 1985); *Mayor & Aldermen v. Vicksburg Printing & Publishing Co.*, 434 So. 2d 1333, 1336-38 (Miss. 1983) (openness in government is public policy in Mississippi and is conducive to good government).

⁵ 551 So. 2d 107 (Miss. 1989).

⁶ Note, *The Personnel Matters Exception to the Mississippi Open Meetings Act - A Cloud Over the Sunshine Law*, 7 Miss. L. REV. 181, 184 (1987) (authored by Richard A. Oakes) [hereinafter Note, *The Personnel Matters Exception*]. All fifty states have enacted open meeting statutes. Statutory enactment was necessary as the open meeting concept did not descend from common law. *Id.*

⁷ Note, *The Personnel Matters Exception*, *supra* note 6, at 184. Utah's statute re-

enactment of Florida's Sunshine Law were ably expressed by the Florida Supreme Court when it stated:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years, tendencies towards secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.⁸

B. In Mississippi

As late as 1974, Mississippi was one of only four states without legislation mandating that public bodies in the state hold open meetings.⁹ However, in 1975, Mississippi enacted its Open Meetings Act.¹⁰ The Act contains a sweeping declaration of legislative intent:

It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared

quired a city council to "sit with open doors." *Id.* Other states began to add open meeting laws as a result of newspapers seeking admission for their reporters to governmental meetings. *Id.*

⁸ Board of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969). The court further stated that since the sunshine law was enacted for public benefit, it should be interpreted most favorably to the public. *Id.*

⁹ Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 Miss. L. J. 1151, 1154 (1974) (authored by William R. Wright II) [hereinafter Comment, *Open Meetings Laws*].

¹⁰ 1975 Miss. LAWS 421.

to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.¹¹

Moreover, in 1981, the legislature strengthened the Act by prescribing the method a public body must utilize to enter into executive session and by limiting the reasons therefor exclusively to specified statutory exemptions to open meetings.¹² Although no legislative history exists of either the 1975 or the 1981 bills, the exemptions adopted are similar to those previously adopted in Louisiana.¹³

By enacting this law, the Mississippi Legislature made clear its intent to open the mechanics of state and local government to public view. However, either through oversight or deliberate act, many public bodies have continued to conduct their business in secrecy, thereby frustrating the purpose of the Act. Furthermore, the Act itself is, in some areas, vague. It has been left to the judicial branch of government to clarify the Act and to provide the procedure for its enforcement. By a string of decisions, beginning with *Mayor & Aldermen v. Vicksburg Printing and Publishing Co.*,¹⁴ and culminating with *Hinds County Board of Supervisors v. Common Cause of Mississippi*,¹⁵ the Mississippi Supreme Court recognized and upheld the legislative intent declared in the Open Meetings Act and put teeth into its enforcement.

II. SUBSTANCE OF THE OPEN MEETINGS ACT

Briefly, Mississippi's Open Meetings Act provides that any meeting of a covered state, county, or local governmental entity must be open to the public unless the entity goes into executive

¹¹ MISS. CODE ANN. § 25-41-1 (Supp. 1989).

¹² MISS. CODE ANN. § 25-41-7 (Supp. 1987). To enter into executive session the public body must begin a meeting as an open meeting and then an affirmative vote of three-fifths of all members present is required to declare an executive session. *Id.* An executive session may be held only for reasons specifically set out in the statute. *Id.*

¹³ Compare, MISS. CODE ANN. § 25-41-7(4)(Supp. 1989) with La. Rev. Stat. 42:6.1 (West Supp. 1989) (both statutes have similar provisions).

¹⁴ 434 So. 2d 1333 (Miss. 1983).

¹⁵ 551 So. 2d 107 (Miss. 1989).

session.¹⁶ The law limits executive sessions to certain specifically enumerated situations.¹⁷ Furthermore, the mechanics for entering into an executive session are detailed in the Act.¹⁸ A covered public entity is required to give notice to the public concerning the time and place of its meetings¹⁹ and must make public written minutes of its proceedings,²⁰ even those made while in a valid executive session.²¹

A. *Who is covered by the Act?*

State and local executive or administrative policy-making entities, including boards, commissions, authorities, councils, departments, agencies, and bureaus must conduct their meetings in accordance with the Open Meetings Act.²² Other governmental entities are covered by the Act if they are supported wholly or in part by public funds, or if they spend public funds, and if they are created either by statute or executive order.²³ This category includes any standing, interim, or special committee of the Mississippi Legislature.²⁴ The State Board of Trustees of State Institutions of Higher Learning is covered, even though it was

¹⁶ MISS. CODE ANN. § 25-41-5 (Supp. 1989). The statute declares that meetings of public bodies are in effect public meetings. *Id.*

¹⁷ MISS. CODE ANN. § 25-41-7(4) (Supp. 1989).

¹⁸ MISS. CODE ANN. § 25-41-7 (Supp. 1989). The Code provides that there must be an affirmative vote of three-fifths of the members present to declare an executive session. *Id.* Before the vote for an executive session takes place there must be a preliminary determination at a closed meeting for its need. *Id.* The reason for having a closed session is to be stated in an open meeting and must be recorded in the minutes of the meeting. *Id.* The total vote as to whether or not to have an executive session is to be recorded in the minutes as well. *Id.* Any vote to have an executive session is valid only for that particular meeting or that particular day. *Id.*

¹⁹ MISS. CODE ANN. § 25-41-13. This section of the code was amended in 1990 to provide that a public body must post notice of any recess meeting. It must provide notice of the place, date, hour, and subject of such called meeting in a prominent place available to examination and inspection by the general public in the building in which the public body normally meets. *Id.*

²⁰ MISS. CODE ANN. § 25-41-11 (1989). The minutes must show which of the members were present and absent. *Id.* The minutes should also reflect the date, time, and place of the meeting along with any final actions taken at the meeting. *Id.* A record must also be made by a member of any votes taken. *Id.*

²¹ *Id.*

²² MISS. CODE ANN. § 25-41-3(a) (Supp. 1989).

²³ *Id.*

²⁴ *Id.*

created by constitutional provision, as well as by statute.²⁵ Advisory boards and commission are also included in the terms of the Act.²⁶ Finally, joint meetings between two or more covered bodies are covered.²⁷

B. Who is exempt from the Act?

The Open Meetings Act specifically exempts the following entities from coverage: (1) the judiciary, including all jury deliberations; (2) public and private hospital staffs; (3) public and private hospital boards and committees thereof; (4) law enforcement officials; (5) the military; (6) the state probation and parole board; and (7) the workmen's compensation committees.²⁸

Generally, private or quasi-public bodies will not be covered unless they are (1) created by statute or executive order and (2) supported wholly or in part by public funds.²⁹

C. What is a meeting?

The Open Meeting Act defines a meeting as "an assemblage of members of a public body at which official acts may be taken upon a matter over which the public body has supervision, con-

²⁵ *Board of Trustees v. Mississippi Publishers Corp.*, 478 So. 2d 269, 273-78 (Miss. 1985). The Board of Trustees argued that constitutional provisions governing the Mississippi Institutions of Higher Learning overrode the requirements of the Open Meetings Act. *Id.* The Mississippi Supreme Court stated the purpose "of giving the Board constitutional status was to remove it from political interference but not to make it a separate branch of government." *Id.* Accordingly, the court held that the Board was not beyond the reach of the Open Meetings Act or any other statute which has general application to all state agencies. *Id.*

²⁶ *Mayor & Aldermen v. Vicksburg Printing & Publishing Co.*, 434 So. 2d 1333, 1336-38 (Miss. 1983). The City of Vicksburg and its Planning Commission claimed the Open Meetings Act did not apply to the Planning Commission. *Id.* The position was taken that the Act applied only to "policy making entities" and since the Planning Commission had no power to make final binding decisions it was *excluded*. *Id.* The Mississippi Supreme Court took the position that the Open Meetings Act applied to any agency, commission, committee, department, or bureau of any "municipal corporation" unless there was an express exclusion provided. *Id.*

²⁷ *Common Cause v. Hinds County Board of Supervisors*, No. 118,528 (Hinds County Chancery Court Aug. 18, 1986).

²⁸ Miss. CODE ANN. § 25-41-3(a) (Supp. 1989).

²⁹ *Op. Att'y Gen.* (Dec. 4, 1987), to Sen. Irb Benjamin. The Northeast Mississippi Community Action Agency is exempted because it is non-profit public corporation formed for the purpose of administering federal programs. *Id.*

trol, jurisdiction, or advisory power.”³⁰ This definition is broad enough to include any meeting, as long as any deliberation leading to formation or termination of public policy occurs, whether any vote is taken or any other acts done.³¹ This includes informal meetings, working lunches, and irregularly scheduled “work sessions.”³²

D. What is not a meeting?

If a meeting is by chance, or is purely a social gathering (and not intended to circumvent the Open Meetings Act), it is excluded from the requirements of openness by the specific terms of the Act.³³ According to the Mississippi Supreme Court, “[A] public board should be available for social functions with charities, industries and businesses, at which no action is taken and their only function is to listen, without being subjected to the Act.”³⁴ Obviously, a “chance” meeting “cannot be [one] which was called, either officially or unofficially.”³⁵ Some factors to consider in deciding whether a meeting is a “social gathering” include: “[t]he activities that take place, the advance call or notice given the members, an agenda, the claim for per diem and travel expenses by the Board members, and other pertinent factors.”³⁶ Use of a telephone poll or conference call to circumvent the Act will not be allowed.³⁷

³⁰ MISS. CODE ANN. § 25-41-3(b) (Supp. 1989).

³¹ *Common Cause*, 551 So. 2d at 123 (quoting *Board of Trustees v. Mississippi Publishers*, 478 So. 2d 269, 279 (Miss. 1985)). See also Op. Att’y Gen. to Franklin C. McKenzie (Aug. 22, 1984) (all meetings must be open with exception of “chance meetings” and “social gatherings”).

³² *Id.*

³³ MISS. CODE ANN. § 25-41-17 (Supp. 1989).

³⁴ *Common Cause*, 551 So. 2d at 123.

³⁵ P. Flynn, A GUIDE TO MISSISSIPPI’S OPEN MEETINGS AND OPEN RECORDS LAWS (1986).

³⁶ *Mississippi Publishers*, 478 So. 2d at 278.

³⁷ *Id.* at 278-79. The court held that the use of the telephone to conduct official acts prevented the disclosure of business addressed by the board. *Id.*

E. Executive sessions

1. What is an executive session?

The legislature has recognized certain limited situations when a portion of a public body's otherwise open meeting may be closed to the public. This device is termed the "executive session." The law contemplates the meeting beginning as an open one, but, for one of the enumerated limited purposes, the body may vote to go into executive session.³⁸

The Act specifies that executive sessions shall not be used to circumvent or defeat the purposes of the Open Meetings Act.³⁹ In order to prevent this, the legislature has enumerated certain specific purposes for which an executive session may be called. They may be summarized as follows:

- (1) "transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position;"
- (2) strategy sessions or negotiations concerning prospective or actual litigation;
- (3) business concerning security personnel, plans or devices;
- (4) investigative proceedings concerning allegations or misconduct or violations of law;
- (5) cases of extraordinary emergency posing immediate or irrevocable harm of persons or property;
- (6) matters concerning the prospective purchase, sale or leasing of land;
- (7) the preparation of tests for admissions to practice in recognized professions;
- (8) the location, relocation or expansion of a business or industry;
- (9) the employment and termination of employees, including the right to discuss a line item in a budget which might affect

³⁸ MISS. CODE ANN. § 25-41-7(1) (Supp. 1989). A public body enters into executive session to address public business; thus, exceptions are limited. *Id.*

³⁹ MISS. CODE ANN. § 25-41-7(3) (1989). The Act also requires that the reason for holding an executive session be stated at the open meeting and be recorded in the minutes therein. *Id.*

the termination of an employee or employees;

(10) discussions between a school board and individual students within the board's jurisdiction by the parents or teachers of such students regarding problems of the students, parents, or teachers; and

(11) any body of the state legislature which is meeting on matters within the jurisdiction of such body.⁴⁰

As might be expected, these exemptions have provided fertile ground for the imagination of entities looking for loopholes in the Act that would enable them to discuss business in secret. However, the Mississippi Supreme court, through its interpretations of the Act, has plugged many of these holes. For example, in *Vicksburg Printing*,⁴¹ the court defined "prospective litigation" in the Act to mean "litigation reasonably likely to occur in the reasonably foreseeable future."⁴² In *Common Cause*,⁴³ the court restricted the "personnel matters" exemption "to matters dealing with employees hired and supervised by the [entity], not those employees of some other [entity], and not other . . . officials themselves. Nor, would a member of the [entity] be classified 'personnel.'" The court went on to hold, "[A]n independent contractor such as an accountant, lawyer, or architect is not an employee of the board, and would not come under 'personnel.'"⁴⁴ The Mississippi Legislature further limited the personnel exemption in its 1990 session with clarifying language that limits the use of the exemption to transaction of business relating to job performance, character, professional competence, or physical or mental health of a person holding a specific

⁴⁰ MISS. CODE ANN. § 25-41-7(4)(a-k) (Supp. 1990); *Mississippi Publishers*, 478 So. 2d at 280. These provisions were amended in 1990 to tighten the prior language of the section which allowed a more generalized personnel exemption and to allow discussion of a budget line item in executive session that might result in the termination of one or more employees.

⁴¹ *Vicksburg Printing & Publishing Co.*, 434 So. 2d at 1340.

⁴² *Id.* The court held that the chancellor's interpretation of "prospective litigation" to mean "imminent litigation" was too restrictive. *Id.*

⁴³ *Common Cause*, 551 So. 2d at 124-25.

⁴⁴ *Id.* at 124. The court did not have any difficulty restricting the definition of "personnel matters." *Id.* The court reasoned that the definition did not apply to county officials or their employees. *Id.* An independent contractor, such as an "accountant, lawyer, or architect," is not an employee of the board. *Id.*

position.⁴⁵

More importantly, in terms of future enforcement of the Act, the court has declared that the fact that a specific discussion may arguably fall under the ambit of one of the exceptions to the Open Meetings Act does not conclusively validate the withdrawal into executive session.⁴⁶ As the court recognized, the purpose of the Act is that meetings of public bodies be open. Moreover, as stated earlier, the Act itself mandates that executive session not be used to circumvent its terms. Therefore, an executive session is only justified where there is "at least a reasonably arguable basis of an actual present need for a closed meeting on the subject."⁴⁷

2. How does an entity enter into executive session?

As stated earlier, meetings of public bodies must begin as open meetings.⁴⁸ During that meeting, if a matter arises that a member believes should be discussed in executive session, he may move to close the meeting for a private discussion of whether to enter such a session.⁴⁹ At that time, no reason need be disclosed to the public as to the reason for the potential executive session, and a simple majority vote will close the meeting to determine whether or not to enter executive session.⁵⁰ No other matter may be discussed during this portion of the meeting.⁵¹

A three-fifths majority vote is required to enter into executive session.⁵² This vote must be made openly,⁵³ and be recorded

⁴⁵ MISS. CODE ANN. § 25-41-7(4)(a).

⁴⁶ *Common Cause*, 551 So. 2d at 125. Statutory exceptions are to be strictly construed against executive session. *Id.*

⁴⁷ *Id.* The court held that allowing "executive sessions" merely because they are permitted by statute or defined as "personnel matters" would defeat the purpose of the statute. *Id.*

⁴⁸ MISS. CODE ANN. § 25-41-7(1); *Common Cause*, 551 So. 2d at 110-11.

⁴⁹ MISS. CODE ANN. § 25-41-7(2) (Supp. 1989); *Common Cause*, 551 So. 2d at 111.

⁵⁰ *Id.*; *Common Cause*, 551 So. 2d at 111.

⁵¹ *Id.*

⁵² MISS. CODE ANN. § 25-41-7(1) (Supp. 1989). The three-fifths majority vote is required of all members present. *Id.*

⁵³ *Id.*

and spread upon the minutes.⁵⁴ The vote only applies to the entity's meeting on that day.⁵⁵ A public body may not schedule a regular executive session, nor may it vote in advance of its meeting to have an executive session.⁵⁶

An important part of the procedure required for entering into executive session is informing the public attending the meeting of the reason for the closed session. The Act states, "The reason for holding such an executive session shall be stated in an open meeting, and the reason so stated shall be recorded in the minutes of the meeting."⁵⁷ However, in *Common Cause*,⁵⁸ the Mississippi Supreme Court recognized that this bare-bones requirement did not always suffice to give the public an adequate reason for the closure of a public meeting. Therefore, the court added further requirements:

When reason given, of course, must be meaningful. It must be more than some generalized term which in reality tells the public nothing. To simply say, "personnel matters," or "litigation," tells nothing. The reason stated must be of sufficient specificity to inform those present that there is in reality a specific, discrete matter or area which the board had determined should be discussed in executive session."⁵⁹

When this language, combined with the court's later statement requiring that there be an "actual, present need" for a closed meeting,⁶⁰ seems to impose a requirement on public bodies to give the public the reason why a matter falling under an exception to the Open Meetings Act actually requires private discussion. In other words, the entity involved must apparently state, for example, "We are going into executive session to discuss the Myers litigation, which is pending in the circuit court.

⁵⁴ MISS. CODE ANN. § 25-41-7(5) (Supp. 1989).

⁵⁵ MISS. CODE ANN. § 25-41-7(6) (Supp. 1989).

⁵⁶ MISS. CODE ANN. § 25-41-6 (Supp. 1989).

⁵⁷ MISS. CODE ANN. § 25-41-7(3) (Supp. 1989).

⁵⁸ *Common Cause*, 551 So. 2d at 111.

⁵⁹ *Id.* The executive session should not be used to evade the purpose of the Open Meetings Law. *Id.*

⁶⁰ *Id.* at 125. The court held that even if the stated reason for executive session falls under "personnel matters" or other exceptions set out by the statute, absent a reasonable justification the meeting may still be required to be open. *Id.*

Because we are formulating a settlement offer, a closed session is necessary." In this fashion, the interests of the entity as well as the public are protected, and the purpose behind the Open Meetings Act is preserved.

F. What are the notice requirements for a meeting?

The Attorney General has said that notice must be "reasonably calculated to insure that a person could find out that a regular, recessed, interim or special called meeting is scheduled and where and when it will occur."⁶¹ If the time and/or place of an entity's meetings are not set by law, the body must, at its first regular or special meetings, spread upon its minutes the times and places for its meetings, as well as the procedure by which all of its meetings are to be held.⁶² Notice for any recess, adjourned, specially called, or interim meeting of a public body must be posted within one hour after the meeting is called in a prominent place available for examination and inspection by the general public in the building in which the public body normally meets.⁶³

In the case of county boards of supervisors, an additional statute requires notice of all special or adjourned meetings not held at the statutorily mandated time must be posted at the courthouse door for at least five days prior to the meeting, or published in a newspaper in the county at least five days before the meeting.⁶⁴ During a regular or special legislative session, notice of meetings of all committees, other than conference committees, shall be given by announcement on the loudspeaker during sessions of the house or senate or by posting on a bulletin board. When not in session, the meeting times and places of all

⁶¹ Op. Att'y Gen. to E. Foley Ranson (Mar. 23, 1983).

⁶² MISS. CODE ANN. § 25-41-13(2). Legislative committees are not included in this requirement. *Id.*

⁶³ MISS. CODE ANN. § 25-41-13(1) (Supp. 1990). If there is no change in the time, place, and procedures, the public body is not required to post any further notice. *Id.* If there is a change, a copy of the notice must be placed in the minutes of the body. *Id.*

⁶⁴ Op. Att'y Gen. to Joe B. Moss (Dec. 29, 1986). Section 19-3-19 sets out the procedures that a county board of supervisors should take if it has a special meeting. *Id.* The Attorney General stated that a notice permanently posted at the door of the courthouse would fulfill the statutory requirement. *Id.*

committees must be kept by the clerk of the house or secretary of the senate.⁶⁵ As stated earlier, however, legislative subcommittees and conference committees are exempt from the terms of the Act.⁶⁶

G. What are the requirements for minutes?

Minutes must be kept of all open meetings and executive sessions showing: the numbers present and absent; the date, time and place of the meeting; an accurate recording of any final actions taken at such meetings; and a record by individual member of any votes taken.⁶⁷ As previously described, an entity's minutes must reflect the entrance into executive session and the reason for the session. The minutes must also reflect the results of any vote taken and the breakdown of votes by each individual member.⁶⁸

Minutes must be recorded within a reasonable time, not to exceed thirty days after recess.⁶⁹ They are considered to be a public record, and therefore must be open for public inspection during regular business hours.⁷⁰ They are subject to the provisions of the Public Records Act, Miss. Code Ann. §§ 26-61-1 through -17 (Supp. 1989).⁷¹

⁶⁵ Miss. CODE ANN. § 25-41-17(3-4) (Supp. 1990). When not in session, information regarding meeting times and places should be available during regular working hours. *Id.*

⁶⁶ Miss. CODE ANN. § 25-41-3(a)(8) (Supp. 1989). Any standing, interim, or special committee of the Mississippi Legislature is exempt from the Act. *Id.*

⁶⁷ Miss. CODE ANN. § 25-41-11 (Supp. 1989). A public body shall keep minutes of all meetings, whether open or executive session. *Id.*

⁶⁸ *Id.* The minutes should contain an accurate recording of all final action, and record of how individual members have voted. *Id.*

⁶⁹ *Id.*; see Op. Att'y Gen. to Mike Davis (Aug. 22, 1983) (public body has set period of time in which to respond to request for inspection of copies of minutes; if unavailable, then response explaining why minutes are not available should be sent to requesting party).

⁷⁰ Op. Att'y Gen. to Mike Davis (July 16, 1986). The Mississippi Code requires minutes of state funded agencies, like those of the Pearl River Development District, to be open for public inspection. *Id.*

⁷¹ Op. Att'y Gen. to Mike Davis (Aug. 22, 1983); Op. Att'y Gen. to Charles S. Tindall, III (Jan. 2, 1986). Any person has the right to inspect public records in accordance with the written procedure adopted by the public body. *Id.* Op. Att'y Gen. to Mike Davis (Aug. 22, 1983). Minutes which are included in the definition of public records are subject to inspection or duplication. *Id.*

H. Can the general public participate in a meeting?

The Open Meetings Act provides that any public body subject to the Act may make and enforce reasonable rules and regulations for the conduct of persons attending its meetings.⁷² Such reasonable rules could permit attendees to ask questions during all or part of the meeting, or the rules could provide that questions are permitted only at the conclusion of a meeting.⁷³ Additionally, to the extent that a meeting of a public body concerns agency rule making as defined in the Mississippi Administrative Procedures Law,⁷⁴ the agency is required to "adopt procedures to assure that persons who give timely notice of their desire to contest the making of any rule shall have an opportunity to present their views and have the opportunity for review of adverse rulings."⁷⁵

Moreover, an attorney general's opinion relying upon the law of other states has stated that one entitled to be at a public meeting may "take such notes as he may desire . . . in any form selected by him, so long as it does not interfere with the orderly conduct of the meeting."⁷⁶ It would appear, then, that a public body may not prevent the use of a tape recorder or like device unless it interferes with the orderly conduct of a meeting.

I. What enforcement mechanisms are available?

After being denied permission to attend a public meeting, a party may seek injunctive relief in chancery court.⁷⁷ Suit should be filed in the county where the board members reside.⁷⁸ There

⁷² MISS. CODE ANN. § 25-41-9 (Supp. 1989).

⁷³ Op. Miss. Att'y Gen. Aug. 2, 1982, to Sarah W. Grantham.

⁷⁴ MISS. CODE ANN. § 25-43-1 through -19 (Supp. 1989).

⁷⁵ MISS. CODE ANN. § 25-43-17 (Supp. 1989).

⁷⁶ Op. Miss. Att'y Gen. Sept. 18, 1985, to Stanford Young.

⁷⁷ MISS. CODE ANN. § 25-41-15 (Supp. 1989). The statute gives chancery courts of the state authority, upon application of any citizen of the state, to enforce provisions of the chapter by issuance of injunction or writ of mandamus.

⁷⁸ Board of Trustees v. Van Slyke, 510 So. 2d 490, 492-93 (Miss. 1987). The Mississippi Supreme Court rejected appellee's contention that the board was sued as an entity, and therefore subject to suit in any county in which it "does business." The court reasoned that since a government entity cannot respond by affirmative conduct, only an individual may be ordered to do a specific act under the Mississippi Public Records Act. Therefore, the court concluded, suit must be instituted in the chancery court of the

are no provisions in the Act for the award of penalties or attorneys' fees; however, as will be more fully discussed below, the Mississippi Supreme Court has affirmed the award of attorneys' fees for the violation of the Act and a prior consent decree.⁷⁹

There is authority in some states for the proposition that an action taken in violation of an open meetings act is voidable.⁸⁰ However, these rulings are generally based on specific or applied statutory language.⁸¹ The Mississippi Act is silent on the matter, and the question has not been pursued in the Mississippi Supreme Court.

III. MISSISSIPPI CASE LAW ON OPEN MEETINGS

A. *Mayor & Aldermen of Vicksburg v. Vicksburg Printing & Publishing Co.*⁸²

This case involved an executive session called by the City of Vicksburg Planning Commission ("VPC") to consider extending the corporate boundaries of the city. The stated reason for the executive session was the discussion of prospective litigation.⁸³ The issues considered by the Mississippi Supreme Court in its opinion included: (1) the applicability of the Open Meetings Act to the VPC; and (2) the use of the litigation exception to enter into executive session for the purpose of considering proposed annexation.

1. Openness in government is the policy of the state

After discussing the facts that gave rise to the case, Justice

county in which the members of the board named in the suit reside. *Id.*

⁷⁹ *Common Cause*, 551 So. 2d at 125-26. The Mississippi Supreme Court left the amount of the fees to be awarded in each case to the discretion of the chancellor. *Id.* at 126.

⁸⁰ See *Wolf v. Zoning Board of Adjustment*, 192 A.2d 305, 308 (N.J. 1963) (lack of bad faith or impropriety by public body should not force court to refuse to avoid action made in derogation of statute).

⁸¹ Annot., *Validity, Construction and Application of Statutes Making Public Proceedings Open to the Public*, 38 A.L.R.3d 1070, 1086 (1971).

⁸² 434 So. 2d 1333 (Miss. 1983).

⁸³ *Vicksburg Printing & Publishing Co.*, 434 So. 2d at 1334. In the executive session the VPC met with two expert city planners. All attorneys, members of the press and the public were excluded. *Id.*

Robertson began this first opinion construing the Open Meetings Act with a strong statement of the philosophy behind the Act. As he wrote, "Openness in government is the public policy of this state. It is conducive to good government, and heroic deeds."⁸⁴ He noted the distrust of government engendered by recent events, and quoted from the declaration of the purpose of the Open Meetings Act.⁸⁵ Part of the significance of this case is its influence on subsequent opinions of the court, which have repeated this emphasis on the desirability of openness in government, as recognized in the declaration of the Act.⁸⁶

2. Advisory boards and commissions are included in the terms of the act

The VPC had advanced two theories to argue against its being considered governed by the Act: (1) that it was an "advisory commission" not expressly named within the Act; and (2) that it was not a "policy making entity" having power to make final, binding decisions.⁸⁷ In ruling that the Act did apply to the VPC, the court made short shrift of each of the arguments. Examining the definition of "public body" contained within the Act, the court held that the commission, as an important branch of municipal government supported by public funds, was included in the language of the Act unless excluded by express language.⁸⁸

⁸⁴ *Id.* at 1336. The court quoted in full Miss. CODE ANN. § 25-41-1 (Supp. 1982), which provides in part that "it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein." *Vicksburg Printing & Publishing Co.*, 434 So. 2d at 1336.

⁸⁵ *Id.* Justice Robertson wrote, "Government which does not have the confidence of the people can never govern effectively." *Id.*

⁸⁶ *Id.* The statute states that it is "essential to the fundamental philosophy of the American constitutional forum of representative government and to the maintenance of a Democratic society that public business be performed in an open and public manner." Miss. CODE ANN. § 25-41-1 (Supp. 1989).

⁸⁷ *Vicksburg Printing & Publishing Co.*, 434 So. 2d at 1337.

⁸⁸ *Id.* The definitions section of the Open Meetings Act defines "public body" as: (i) any executive or administrative board, commission, authority, council, department, agency, bureau, or any other policy-making entity or committee thereof, of the State of Mississippi, or any political subdivision or municipal corporation of the state, whether such entity be created by statute or executive order, which is supported wholly or in part by public funds or expends public

As to the argument that the commission had no power to make final decisions, the court held that the commission was "a sufficient participant in policy making within the City of Vicksburg to bring itself well within the applicable statutory definition."⁸⁹

3. Discussion of potential annexation falls within the Litigation Exception

The court held that the meeting to discuss annexation of areas outside the city fell within the litigation exception to the Open Meeting Act. First, judicial proceedings would be required to confirm the proposed annexation.⁹⁰ Second, a group of property owners had already announced its opposition to the litigation in question.⁹¹ Finally, after reviewing the minutes of the meeting, the court determined that the proposed annexation was indeed the subject of the executive session.⁹²

More importantly, in terms of the effect of this opinion on future open meetings litigation, the court defined the litigation exception. It reversed the lower court's definition of "imminent litigation" as being too restrictive.⁹³ Instead, the court defined the phrase "prospective litigation" as "litigation reasonably likely to occur in the reasonably foreseeable future."⁹⁴

funds.

MISS. CODE ANN. § 25-41-3(a) (Supp. 1989).

⁸⁹ *Vicksburg Printing & Publishing Co.*, 434 So. 2d at 1338. The VPC argued that the commission had the authority only to recommend annexations to the mayor and board of aldermen, who have the sole power to adopt an annexation ordinance. The court, however, did not find statutory language or legislative intent that would exclude the commission from the coverage of the Act. *Id.* at 1337-38.

⁹⁰ *Id.* at 1338; MISS. CODE ANN. § 21-1-29 (annexation requires municipality to file in chancery court of county in which such territory is located).

⁹¹ *Vicksburg Publishing & Printing Co.*, 434 So. 2d at 1338. The Warren County Property Owners Association, a group with a past record of annexation litigation, had announced its intention to oppose any annexation. *Id.*

⁹² *Id.* at 1339. The minutes of the meeting reflected that the VPC discussed the specific legal requirements for a successful annexation confirmation. *Id.*; see generally *Dodd v. City of Jackson*, 238 Miss. 372, 384, 118 So. 2d 319, 324 (1960) (discussion of relevant factors to be considered in annexation confirmation hearing).

⁹³ *Vicksburg Publishing & Printing Co.*, 434 So. 2d at 1340. The chancellor had held that the litigation exception did not apply to the case because no attorneys were present at the meeting. *Id.* at 1339.

⁹⁴ *Id.* at 1340. The court reasoned that this definition more accurately reflected the legislative intent of MISS. CODE ANN. § 25-41-7(4)(b). *Id.*

*B. Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*⁹⁵

This case involved a suit by Mississippi Publishers Corporation, then publisher of two newspapers in Jackson, Mississippi, against the Board of Trustees of State Institutions of Higher Learning and certain individuals of the Board in their official capacities. The primary issue on appeal was the applicability of the terms of the Open Meetings Act to the Board. Additionally, certain procedures of the Board for conducting its official business also came under attack.

1. The Open Meetings Act was enacted for the benefit of the public and is to be liberally construed

As did Justice Robertson before her, Justice Prather began her opinion by lauding the purpose of the Open Meetings Act, "Openness in government is the statutorily declared public policy of this state."⁹⁶ In fact, the entire opinion is peppered with language indicating the court's approval of the Act's effect on public attendance at such meetings. For example, the opinion stated, "[I]n a democratic society the public's business must be open to maintain the public's confidence in its officials, to make intelligent judgments, and to select good representatives."⁹⁷ Moreover, after an exhaustive list of the authorities from other states holding that such boards were governed by open meetings requirements, Justice Prather wrote, "This Court does not accept the premise that the people of this State cannot be entrusted with less disclosure than that of citizens of other states."⁹⁸ The court went on to remind the Board, "[T]he public

⁹⁵ 478 So. 2d 269 (Miss. 1985).

⁹⁶ *Mississippi Publishers*, 478 So. 2d at 271.

⁹⁷ *Id.* at 276 (citing *Athens Observer Inc. v. Anderson*, 245 Ga. 63, 263 S.E.2d 128 (1980) and Comment, *Open Meetings Laws*, *supra* note 9, at 1160. The court acknowledged that this openness might sometimes be unpleasant, difficult or harmful. *Mississippi Publishers*, 478 So. 2d at 271. The court noted that it could not change a statute calculated to further governmental purposes merely because the court found the statute might be inconvenient. *Id.* (citing *Mississippi State Tax Comm'n v. Flora Drug Co.*, 167 Miss. 1, 19, 148 So. 373, 376 (1933)).

⁹⁸ *Mississippi Publishers*, 478 So. 2d at 277-78. The court found the Board could not exempt its activities from the Open Meetings Act and such an attempt was "repug-

policy of openness has been clearly expressed by the legislature. Public access to information is the overriding consideration in this Court decision"⁹⁹ Finally, the court concluded with the statement, "Openness in the conducting of public business by public bodies is wholesome."¹⁰⁰

This abundance of language approving the goals of the Open Meetings Act should be enough to discourage any future litigants from straining to find an exemption to open meetings. However, the court included an additional phrase that should be included in every brief on the issue of whether a body or a particular meeting is subject to the terms of the Act. "The Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public."¹⁰¹ By this phrase, the court has effectively taught that, unless an exemption is specifically found in the Act, it will not be engrafted by the court. Furthermore, it serves as notice that the exceptions to the Act will be strictly construed in favor of openness.

2. Constitutionally created boards are included in the terms of the act

In 1944, the Board of Trustees was created by enactment of article 8, section 213-A of the Mississippi constitution of 1942. It was given further authority by legislative enactment sections 37-101-1 through 15 of the Mississippi Code.¹⁰² In *Mississippi Pub-*

nant and contrary to the intent of the open meetings act as well as the express words that an executive session shall be limited' to the statutorily enumerated exemptions. . . ." *Id.* at 277.

⁹⁹ *Id.* at 279. In adopting the policy of openness in the instant case, the court weighed the potential harm alleged by the Board against the statutorily declared public policy of openness. *Id.*

¹⁰⁰ *Id.* at 282. The court held that subjecting the College Board to the Act would promote the "declared public policy of the state." *Id.*

¹⁰¹ *Id.* at 276; see also *Hinds Co. Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 110 (Miss. 1989) (Open Meetings Act is to be construed liberally in favor of public); *Mayor & Aldermen v. Vicksburg Printing & Publishing Co.*, 434 So. 2d 1333, 1336-37 (Miss. 1983) (language of Open Meeting Act should be construed in light of general goal of openness in government).

¹⁰² *Mississippi Publishers*, 478 So. 2d at 273-74. The court cited Miss. CODE ANN. §§ 37-101-1 to -15 (Supp. 1984), which gave the Board "wide latitude and discretion" in decisions concerning its management and control of state colleges and universities. *Mississippi Publishers*, 478 So. 2d at 273-74. The court explained that the Board originally

lishers, the Board contended that it could not perform its constitutional duties while adhering to the terms of the Open Meetings Act, and, therefore, that it should be exempted from the Act.¹⁰³ Holding that nothing in the laws creating the Board exempted it from the general lawmaking powers of the legislature, recognizing the philosophy of openness that was expressed in the Act, and looking to the decisions of other jurisdictions, the court held that the Board was, indeed, subject to the requirements of open meetings as expressed in the Act.¹⁰⁴

IV. HINDS COUNTY BOARD OF SUPERVISORS V. COMMON CAUSE¹⁰⁵

The court's opinion in this case is a natural evolution of the decisions outlined above. It demonstrates the court's determination to fully enforce the terms of the Open Meetings Act in the face of what has by now become obstinance on the part of some public bodies. Moreover, in allowing the award of attorneys' fees for violation of the terms of the Act, the court has provided perhaps the most effective mechanism available for its enforcement.

A. *History of the Case*

1. Prior litigation

This case arose from the second attempt of Common Cause of Mississippi ("Common Cause") to enforce the terms of the Open Meetings Act with respect to the meetings of the Board of Supervisors of Hinds County. The first attempt was by way of an action filed on February 25, 1982, by Common Cause and certain citizens who were interested in, and affected by, the actions of the Hinds County Board of Supervisors.¹⁰⁶ The complaint alleged that the Board had entered into executive sessions without complying with the terms of the Act. Specifically, Common

had been constitutionally created to "cure the previous political diseases" affecting the state's college system. *Id.*

¹⁰³ *Mississippi Publishers*, 478 So. 2d at 275. Where the Open Meeting Act hinders the Board's constitutional function, the Board argued, the statute must yield. *Id.*

¹⁰⁴ *Id.* at 275-78.

¹⁰⁵ 551 So. 2d 107 (Miss. 1989).

¹⁰⁶ Record at 9-17.

Cause contended that the Board had gone into closed session without an affirmative vote of three-fifths of its members, had transacted non-exempt business during closed sessions, had held recess or interim meetings without notice, and had failed to record individual votes taken in closed meetings.¹⁰⁷ Examples of topics discussed during the closed meetings allegedly included: parking spaces, future banking, distribution of surplus cheese, and "pending litigation."

2. Consent decree

After the complaint was filed, but before an answer was served, the attorneys for Common Cause and the Board of Supervisors together drafted a consent decree.¹⁰⁸ The decree was approved by a Hinds County Chancellor and was entered into the record on May 5, 1982.¹⁰⁹ The decree differed in some respects from the Open Meetings Act, being more specific in the restrictions accepted by the Board. For example, it provided a more restrictive definition of "prospective litigation" than that included in the statute or provided by the Mississippi Supreme Court.¹¹⁰ It also required specific identification of lands or businesses being discussed during executive session, required the recordation of votes by individual members, and prohibited certain topics from discussion in executive session.¹¹¹

3. Litigation reopened

Many of the specific limitations agreed to by the Board were subsequently ignored by its members, and, on November 14, 1983, Common Cause and the individual plaintiffs filed a motion for contempt.¹¹² On February 21, 1984, Mississippi Publishers Corporation, publisher of *The Clarion Ledger* and the *Jackson Daily News*, filed a motion to intervene, which was

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 642.

¹⁰⁹ *Id.* at 18-21.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 31-42.

agreed to by the Board.¹¹³

The plaintiffs alleged fifty-five separate violations of the Open Meetings Act and the 1982 consent decree.¹¹⁴ The plaintiffs also complained that the Board conducted thirty to forty telephone polls and failed to give proper notice of meetings as required by the consent decree.¹¹⁵

Trial of the case ultimately took place over eleven days. The only supervisors who testified were two who had consistently opposed the abuse of the exemptions to the Open Meetings Act. Their un rebutted testimony showed an unrelenting attitude on the part of their fellow Board members to exclude the public from their meetings at every available opportunity. For example, one of the testifying supervisors stated that the Board, in order to rid itself of the public's presence, would recess a meeting without telling those in attendance that it planned to reconvene after lunch, and then reconvene with no members of the public present.¹¹⁶ The Board would also give one reason for entering a closed session, then discuss another topic.¹¹⁷ In fact, the un rebutted testimony of this supervisor was that the consent decree was not followed at all during his tenure as a member of the Board.¹¹⁸ The response of the other supervisors to the continuing objections of two of its members regarding secret meetings was illustrative. Instead of attempting to come within the ambit of the law and the consent decree, the other supervisors requested an attorney general's opinion on whether they could exclude their fellow Board members from the closed meetings.¹¹⁹

The testimony of the other supervisor was that the Board had falsely recorded its minutes so that it could claim compliance with the decree.¹²⁰ He also stated that the Board ultimately stopped going into executive session, not to comply with the consent decree or the law, but to avoid the adverse publicity as-

¹¹³ *Id.* at 54.

¹¹⁴ *Id.* at 254-66.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 895.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1114.

¹¹⁹ *Id.* at 1115-16, 1766-67.

¹²⁰ *Id.* at 1536-37.

sociated with the meetings.¹²¹ None of the remaining supervisors testified at trial.

B. Lower court decisions

The Chancellor issued his findings of fact and conclusions of law on August 18, 1986, and a final judgment was entered on September 5, 1986.¹²² He found that "the defendants failed to follow the 'procedural' requirements of the Act and/or Consent Decree, or both." However, the chancellor found that, because the parties were in some disagreement as to the terms of the Act, the "honest difference of opinion" resulted in "interpretative confusion."¹²³

The chancellor's conclusions of law may be summarized as follows:

1. There can be no impromptu meetings without following the guidelines of the Open Meetings Act.¹²⁴
2. All votes must be recorded by individual Board member.¹²⁵
3. The "personnel exemption" includes "any thing, content or thought relating to persons employed."¹²⁶
4. There can be no discussion of unannounced topics in an executive session.¹²⁷
5. Minutes shall be kept of all meetings.¹²⁸
6. The consent decree was not obtained through fraud, accident, or surprise; therefore, the defendants were bound by it.¹²⁹
7. The Board members "voted affirmatively to enter into an executive session when an executive session was improper; . . . participated in informational and spontaneous meeting; [sic] . . . participated in the commission of other technical violations at one time or another."¹³⁰

¹²¹ *Id.* at 1590-91.

¹²² *Id.* at 2617-2751.

¹²³ *Id.* at 2713.

¹²⁴ *Id.* at 2720.

¹²⁵ *Id.* at 2722.

¹²⁶ *Id.* at 2723-25.

¹²⁷ *Id.* at 2726.

¹²⁸ *Id.* at 2727-29.

¹²⁹ *Id.* at 2729-39.

¹³⁰ *Id.* at 2733-34.

8. The Board members were guilty of civil contempt.¹³¹
9. Lack of intent is not a defense, but may ameliorate the punishment.¹³²

The Chancellor thus sentenced the Defendants to fines and imprisonment, which were suspended, and to community service. He also vacated and set aside the consent decree. The lower court declined to award attorneys' fees to the Plaintiffs.¹³³

C. Supreme Court opinion

Justice Hawkins began the court's opinion in the same manner as Justices Robertson and Prather before him. He quoted from the language of *Vicksburg Printing* and from *Mississippi Publishers* regarding the beneficial purposes of the Open Meetings Act.¹³⁴ He went on to state, "The philosophy of the Open Meetings Act is that *all* deliberations, decisions and business of *all* governmental boards and commissions, unless specifically excluded by statute, shall be open to the public."¹³⁵ The holdings of the decision amplify the court's adherence to this principle.

1. Contempt

The court upheld the lower court's finding that the supervisors violated both the consent decree and the Open Meetings Act.¹³⁶ The court, therefore, upheld the decision of the lower

¹³¹ *Id.* at 2734.

¹³² *Id.*

¹³³ *Id.* at 2738-40.

¹³⁴ *Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 110 (Miss. 1989). Justice Hawkins stated that openness of government promotes better government and is the public policy of Mississippi. *Id.* (citing *Mayor & Aldermen of Vicksburg v. Vicksburg Printing & Publishing Co.*, 434 So. 2d 1333, 1336 (Miss. 1983)). The court also stated that the Open Meetings Act should be interpreted in favor of the public. *Common Cause*, 551 So. 2d at 110 (citing *Board of Trustees v. Mississippi Publishers Corp.* 478 So. 2d 269, 276 (Miss. 1985)).

¹³⁵ *Common Cause*, 551 So. 2d at 110. The court stated that although board members might not be convinced of the need for open meetings, they "should always bear in mind that the spirit of the Act is that a citizen spectator . . . has just as much right to attend the meeting and see and hear everything that is going on as has any member of the board or commission." *Id.* (citing Miss. CODE ANN. § 25-41-1 (Supp. 1989)).

¹³⁶ *Common Cause*, 551 So. 2d at 115. The court found "the procedure required by the Act for going into executive session was ignored [and] the requirement of the Con-

court, holding them in contempt.¹³⁷ However, the court disagreed with the lower court's assessment that the Board members could not be guilty of criminal contempt since it had found they had not willfully and intentionally violated the terms of the consent decree.¹³⁸ In fact, the court noted, "The record clearly shows time and again the contrary to be the case. These defendants may not have realized the full import and significance of their disobedience, but they could not have been blind to the fact that they were not complying with the Decree or the Act."¹³⁹ However, since the trial court had found the supervisors not guilty of criminal contempt, the supreme court had to content itself with this finding.¹⁴⁰

2. Penalties (including attorneys' fees)

As the Board members were adjudged not guilty of criminal contempt, it followed that the court was compelled to vacate the criminal penalties imposed upon them.¹⁴¹ However, in what may be the most significant long-term effect of the court's decision, it reversed the lower court's disallowance of attorneys' fees in the case.¹⁴² This holding resulted in an award of \$68,500 in attorneys' fees to the plaintiffs: \$50,000 to Mississippi Publishers Corporation and \$18,500 to the attorneys for Common Cause.¹⁴³ In making that award, the supreme court noted the argument of Common Cause and Mississippi Publishers that "the defendants, or *violators of the Act*, should be required to pay attorney's fees because otherwise an individual or body will be reluctant to bring suits to enforce compliance with the statute."¹⁴⁴ Thus, the opinion is not entirely clear as to whether attorneys'

sent Decree as to identifying the litigation was ignored." *Id.*

¹³⁷ *Id.* at 121. The court held that civil contempt does not require "bad faith or willful violation of the act," but only an awareness of the violation. *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* The court could not reverse on this issue. It compared such an action to reversing a jury's verdict of acquittal, which is also beyond its power. *Id.* (citing *Masonite Corp. v. International Woodworkers*, 206 So. 2d 171, 178 (Miss. 1968)).

¹⁴¹ *Id.*

¹⁴² *Id.* at 125.

¹⁴³ Order of Chancellor Anthony T. Farese, dated July 9, 1990.

¹⁴⁴ 551 So. 2d at 125 (emphasis added).

fees will be available for violation of the Act or whether a prior consent decree is a prerequisite.

3. Reinstatement of consent decree

The Board of Supervisors had argued to the lower court that the consent decree was vague, and the lower court had agreed. The Chancellor vacated the decree, "to avoid the possibility of future conflict."¹⁴⁵ The Mississippi Supreme Court reversed this ruling, noting that the proper action would have been for the Board to petition the lower court for assistance in re-fashioning the decree in a manner with which it could have complied. Moreover, the court held that the decree "is to remain in effect until the Board has shown a willingness and actual practice over a period of time of compliance."¹⁴⁶

D. Effect on future litigation

The court has, once more, demonstrated its intent to stringently enforce the Open Meetings Act through its opinion in *Common Cause*. The adamant tone taken by Justice Hawkins in the opinion may persuade intransigent public officials that further resistance to the terms of the Act is futile. As a more practical legacy, the court has given the public a real means of enforcing the Act, if it will uphold an award of attorneys' fees for mere violations of the Act. Finally, the court's clarification of the personnel exemption and its requirement of a stated reason to enter into executive session, even for discussion of a statutorily recognized subject, should go far to prevent future abuses of the exceptions to the Act.

V. WHAT TO DO ABOUT ACCESS IF YOU REPRESENT THE MEDIA

Knowledge of the terms of the Open Meetings Act and the Mississippi Supreme Court's decisions on the Act is, of course, essential to representation of the media on this issue. Clients need to be apprised of the state of law as it applies to their attendance of meetings of public bodies. The combination of semi-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

nars and handbooks has proven useful for the writers of this article. Likewise, sending this information to public bodies with whom your clients deal on a routine basis may forestall future closures.

Reporters should have instructions to call their office the moment they are denied access to a public meeting. In many cases, that call results in a conference between the media lawyers and the public body that opens the meeting. A quick review of the decisions discussed herein has convinced many public bodies that a closed meeting is neither necessary nor desirable.

The first step in enforcing the terms of the Open Meetings Act is to seek access to a meeting and be turned down. Should the meeting in question be labelled an executive session, the reporter or his attorney should request that the meeting be opened or an explanation of its closure given. If the reason for closure appears impermissible, then the reporter should request that his objection to closure of the meeting be placed on the body's minutes.

In the event that violation of the Act results in litigation, the media party may wish to offer to settle the cause by use of a consent decree. As demonstrated by the *Hinds County Board of Supervisors* case, such a decree not only saves the expense of litigation, but serves as a basis for strict enforcement of its terms in the courts.

CONCLUSION

There is no doubt that the Open Meetings Act will continue to provide fertile ground for litigation in the 1990's. Some public officials will never relinquish the idea that they can best operate in secrecy, and the Mississippi Supreme Court's message is lost on them. Even as the court has closed some of the loopholes in the exceptions to the Act, others will surely arise. However, as the public becomes more aware of its rights in this area, and if the Mississippi Supreme Court continues to enforce those rights, open meetings will become the rule in this state, and closed meetings unthinkable.

REVOLUTION AND CONSTITUTIONALISM IN AMERICA AND FRANCE*

David A. J. Richards**

The American and French traditions of republican constitutionalism share a common origin in the great revolutionary upheavals of the late eighteenth century and a remarkable community of both the personalities and ideas central to those events.¹ To name only a few of the common personalities, Lafayette plays a central role in both the American and French revolutions;² Jefferson authors the American Declaration of Independence, and later in Paris, while in continual correspondence with Madison about the Constitutional Convention in Philadelphia and later ratification debates,³ advises Lafayette and others

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¹ For the best general study of these relationships, see R.R. Palmer, *The Age of the Democratic Revolution*, 2 vols. (Princeton: Princeton University Press, 1959).

² See Patrice Gueniffey, "Lafayette", in Francois Furet and Mono Ozouf, eds., *A Critical Dictionary of the French Revolution* Arthur Goldhammer trans. (Cambridge, Mass.: Harvard University Press 1989), pp. 224-33 (hereinafter cited as Furet, ed., *Critical Dictionary*).

³ See Adrienne Koch, *Jefferson and Madison: The Great Collaboration* (London: Oxford University Press, 1950), pp. 3-61.

about the proper form of a declaration of rights;⁴ and Thomas Paine, who plays so central a role in crystallizing the ideology of the American Revolution, serves in the French National Convention (where he votes against the execution of Louis XVI).⁵ The French self-consciously read and discussed the American constitutions and *The Federalist*,⁶ and the Legislative Assembly in 1792 "included Hamilton and Madison on the list of celebrated servants of humanity."⁷ Americans, for their part, not only try (like Jefferson and Paine) to bring their own revolutionary and constitutional experience directly to bear on the events in France, but one of them, John Adams, publishes an immensely long and learned work (*Defence of the Constitutions of Government of the United States of America*)⁸ addressed to Europeans that defends the American constitutional experiments against an early form of the French constitutional thought (given expression by Turgot) that was to be the model for the later pattern of French constitutionalism (in particular, the unicameral legislature of the 1791 constitution).⁹

During this period the American and French political imagi-

⁴ See Marcel Gauchet, "Rights of Man," in Furet, *Critical Dictionary*, at p. 819.

⁵ See, for a good general study, Eric Foner, *Tom Paine and Revolutionary America* (New York: Oxford University Press, 1976).

⁶ See Marcel Gauchet, "Rights of Man", in Furet, *Critical Dictionary*, at pp. 819-20; Mono Ozouf, "Federalism," *id.*, at p. 54. Even the idea of a unicameral legislature had been suggested to the French by the Pennsylvania constitution of 1776. See Francis Newton Thorper, ed., *The Federal and State Constitutions* vol. V (Washington, D.C.: Government Printing Office, 1909), pp. 3081-92. In fact, Pennsylvania's unicameralism was widely criticized in the United States, and was changed to bicameralism by the Pennsylvania constitution of 1790. *Id.*, pp. 3092-3103. See, for discussion of these American debates, Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton, 1969), pp. 232-36, 438-42.

⁷ Mono Ozouf, "Federalism," in Furet, *Critical Dictionary*, at p. 54.

⁸ See John Adams, *A Defence of the Constitutions of Government of the United States of America*, in C.F. Adams, ed., *Works of John Adams* (Boston: Little, Brown, 1851), vol. 4, pp. 278-588; vol. 5, pp. 3-496; vol. 6, pp. 3-220. On Adams' importance to American constitutionalism, R.R. Palmer, *Age of Democratic Revolution*, vol. 1, pp. 221-28, 267-76.

⁹ See, for a good discussion, Keith M. Baker, "Constitution," in Furet, *Critical Dictionary*, pp. 479-93. In fact, Adams apparently thought, in the circumstances of 1789 in France, that a unicameral legislature was probably the best expedient. See R.R. Palmer, *The Age of the Democratic Revolution*, vol. 1, at p. 498. He would, probably, however have insisted on a strong independent executive, certainly stronger than the suspensive veto accorded the monarch.

nation was, as it were, continuous — a fact we have difficulty in seeing or recapturing because our historiography is interpretively limited by the later events that so decisively distinguish the fates of republican constitutionalism in each country. My concern here is to investigate the period of ferment between roughly 1787 to 1799 before such decisive events occurred, the period when both the Americans and the French (as well as the radical English Whigs like Priestley and Price)¹⁰ thought of themselves as participants in a great public dialogue central to the emancipation of the European political imagination. That emancipation was the property of no nationality or people, but a common political culture available to all. The European wars, which the leaders of the French Revolution initiate in 1792,¹¹ are not thus exclusively defensive, but the not unnatural expression of a universalist ideology that regards the existence of all republican states as the guarantee of the existence of any.¹² Americans are, of course, fundamentally divided on the question of their appropriate degree of involvement in these European events, but, strikingly, set their own destiny as a republic on the project of their own expansion as a federal union of republics in the New World.¹³

Because Americans understand their own revolutionary and constitutional project as thus continuous with the events in France, they are absorbed by those events at the deep level of

¹⁰ See Joseph Priestley, *An Essay on the First Principles of Government* (London: Charles Ely, Political Pamphlet Office, 1835); Richard Price, *Two Tracts on Civil Liberty, the War with America, the Debts and Finances of the Kingdom* (New York: Da Capo Press, 1972); Richard Price, *Observations on the Importance of the American Revolution and the Mean of Making It a Benefit to the World* (New Haven, Conn.: Meigs, Bowen & Dana, 1785).

¹¹ See William Doyle, *The Oxford History of the French Revolution* (Oxford: Clarendon Press, 1989), pp. 197-219.

¹² Montesquieu had himself endorsed the idea that a confederacy of republics may be necessary for the preservation of republican forms of government from the "spirit of monarchy. . . war and enlargement of territory," in Baron de Montesquieu, *The Spirit of the Laws* Thomas Nugent trans. (New York: Hafner Publishing Company, 1949), p. 127.

¹³ The U.S. Constitution expressly guarantees a republican form of government to all its constituent states. See U.S. Constitution, art. IV, sec. 4. Americans thus incorporate Montesquieu's argument (see previous note) into the very structure of their constitutional union of thirteen republican states and its anticipated future admission of republican states to the union.

self-understanding that links the political legitimacy of their own project with that of France. It is for this reason that the first important political division among Americans, the division that leads to its first great political parties, is, at least in part, over the proper American stance toward the events in Europe (in particular, the ongoing war between Great Britain and France).¹⁴ If America had legitimately revolted against Great Britain and established republican constitutionalism as a legitimate form of government, how could America now stand by when France's own revolutionary and constitutional experiment in republican constitutionalism was at threat from America's own previous oppressor? America did wisely remain neutral, but the increasingly tragic turn of events in France haunted and divided Americans.

The United States Constitution is today the longest lasting written constitution in the world, and Americans are no longer haunted by tragic events in a sister republic two centuries ago. But the failure of the French experiment not only made the future of republican government in France a long and difficult struggle, but cast in deep doubt the future of republican constitutionalism everywhere in favor of anti-constitutional ideologies of both the right and left that often self-consciously drew support, in one way or another, from the tragic turn of events in France.¹⁵ Our own period of appeals for democratic emancipation everywhere is, from the perspective of this later history, anomalous and perhaps more historically fragile than we complacently suppose. If so, our belief that the growing commitment to democratic constitutionalism is a legitimate demand of all peoples should be put on the most intellectually and morally secure grounds that we can establish. If the dream of republican

¹⁴ See, in general, Richard Hofstadter, *The Idea of a Party System* (Berkeley, Calif.: University of California Press, 1969); John C. Miller, *The Federalist Era 1789-1801* (New York: Harper & Row, 1960); John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown, 1951).

¹⁵ On the reaction from the right, see Gerard Gengembre, "Burke", in Furet, *Critical Dictionary* pp. 916-23; Massimo Boffa, "Maistre", *id.*, pp. 965-71. On the reaction from the left, see Francois Furet, "Babeuf", *id.*, pp. 179-85; Francois Furet, "Marx", *id.*, pp. 972-79; J.L. Talmon, *The Origins of Totalitarian Democracy* (Harmondsworth, Middlesex: Penguin, 1952). See, in general, Hannah Arendt, *On Revolution* (Harmondsworth, Middlesex: Penguin, 1965).

constitutionalism went wrong in the past, we need to understand why, and there is no better way to do so than to revisit and critically examine the quite different trajectories of American and French revolutionary and constitutional thought. In this way, we may better understand the permanent contribution of the late eighteenth-century democratic revolutions to humane government everywhere, and disentangle that contribution from more local and contingent elements that have often, in fact, retarded that project and may, if we are uncritical and complacent, do so again.

This essay first sets the stage for such an examination by discussing the critical features of the American revolutionary and constitutional enterprise, then contrasts these features to the French enterprise, and finally examines how and why their projects so radically differ. In many cases, the vocabulary of ideas and arguments—apparently common to both projects—is understood and elaborated by each nation in fundamentally different ways in service of quite different ends. For the Americans, consensus on the grounds of their revolution is not in doubt, but a constitutionalism adequate to that consensus is. For the French, the revolutionary consensus is unstable and deeply controversial, and constitutional argument never takes the independent form it did in America, collapsing, rather, into strategies to resolve and create a consensus always problematic and, if anything, rendered progressively more insecure by the self-destructive strategies to which French republicans turned.

I. AMERICAN REVOLUTIONARY AND CONSTITUTIONAL THOUGHT

It is fundamental to the American experience that its revolutionary and constitutional project were conceived as a common enterprise.¹⁶ Leading advocates of the American Revolution (John Adams and Thomas Jefferson) clearly saw constitutionalism at both the state and national levels as the test of the very

¹⁶ The following discussion of American revolutionary and constitutional thought is the subject of my recently published book, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989). For pertinent supporting arguments and citations, I refer the reader, in the text that follows, to the discussions in *Foundations*, not repeating here the citations contained there.

legitimacy of the revolution; accordingly, Jefferson writes no less than three constitutions for Virginia, and Adams is the main author of the Massachusetts constitution of 1780 that was centrally used by the founders in 1787.¹⁷ The success of American constitutionalism was, for Adams and Jefferson, literally the test of the legitimacy of the revolution. In order to understand this attitude, we must examine with care (1) the political principles of the revolution, (2) the relationship of those principles to what the Americans regarded as the pathological misinterpretation of the British Constitution by the British parliament, (3) the analysis of that pathology in light of the history of British constitutionalism and the larger practice of republican and federal experiments over time, (4) the use of such comparative political science in the construction of new structures of government free of the mistakes both of the British Constitution and republican and federal experiments in the past, (5) the weight placed on the experiments in the American states and in the nation between 1776 and 1787 in thinking about institutional alternatives, and (6) the historically unique opportunity self-consciously recognized and seized by Americans in 1787 to develop a new republican experiment that established a new kind of argument more politically legitimate than the arguments of ordinary politics.

A. *Revolutionary Principles*

Americans, following John Locke, accept the truth of persons having inalienable human rights, test the legitimacy of political power against respect for such rights, and justify revolution against Great Britain because of its failure to respect such rights.¹⁸ Both Locke's argument for human rights and associated limits on political power must be understood within the framework of his central defense of an inalienable right to conscience.¹⁹ That defense—the argument for religious toleration—took objection, as a matter of principle, to the political

¹⁷ See David A.J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989), pp. 19-20, 95, 106, 123, 124, 141 (hereinafter cited as Richards, *Foundations*).

¹⁸ See Richards, *Foundations*, ch. 2.

¹⁹ See Richards, *Foundations*, pp. 26-32.

imposition of sectarian religious views as the measure of all reasonable religious and moral views. Such imposition illegitimately used political power to entrench systems of religious and political hierarchy that deprived people at large of their reasonable moral freedom as democratic equals. Locke's political theory generalized this insight into a general theory of political legitimacy, which constrained political power to respect, not trammel, the equal rights of free people.²⁰ American religion gave strong support to these political convictions; its Protestant emphasis on the right to conscience naturally took objection to uses of political power inconsistent with respect for equal rights like that to conscience.²¹

B. *Constitutional Principles of British Constitution*

Americans importantly believed that their revolutionary principles were also fundamental not only to the legitimacy but also to the proper interpretation of the British Constitution.²² Americans took pride in being participants in the British common-law tradition of dissent that had fired the English Civil War and triumphed in the Glorious Revolution of 1688. When the British parliament sought to tax them, the Americans rejected this not only on independent grounds of rights, but also as violative of the common-law principles they took to be fundamental to both the legitimacy and proper interpretation of the British Constitution. Americans anachronistically appealed to Lord Coke's conception of British constitutionalism that he had urged against the tyranny of James I, and appealed to common-law principles (no taxation without representation) that apply not only against the monarchy (the gravamen of Coke's argument) but against the parliament. For Americans like Adams, Jefferson, Wilson, Hamilton, and Dickinson,²³ the British Constitution of parliamentary supremacy had betrayed its own basic

²⁰ See Richards, *Foundations*, pp. 32, 51, 52, 82, 83, 88, 146, 148.

²¹ For a useful general study, see Alan Heimert, *Religion and the American Mind: From the Great Awakening to the Revolution* (Cambridge, Mass.: Harvard University Press, 1966).

²² For fuller discussion, see Richards, *Foundations*, pp. 65-77.

²³ See Richards, *Foundations*, p. 65.

principles of legitimacy, and they needed an alternative form of government that could use the bitter lessons of British constitutional corruption to establish a government more adequate to the true principles of the British Constitution. In that sense, American revolutionary thought was based as much on a view of the true nature of British-style constitutionalism as it was on the inalienable rights of persons, and it would be the natural test of the legitimacy of the American Revolution, thus understood, that it would produce a more adequate conception of constitutionalism than the British understanding of these matters in 1776.

C. *Analysis of Political Pathologies*

For Americans, the betrayal by the British of their own constitution required an analysis of political power and its corruptibilities, and they bring to bear on this question complex historical reflections. These reflections include not only their own oppression by the British, but a larger inquiry into the pathologies of political power under other forms of government, including classical republicanism (ancient Athens, Sparta, Rome; the Florentine and Venetian republics; etc.).²⁴ These investigations led to the pivotal role in American constitutional thought of James Madison's theory of faction²⁵ and John Adams's theory of fame.²⁶ The theory of faction identifies as a permanent fact of group political psychology that it will tend to ignore or denigrate both the rights and interests of those external to the group; and the theory of fame analyzes the psychology of leadership as often motivated by drives of comparative emulation not by more ultimate aims of justice and the public good. Neither Madison nor Adams was a moral skeptic, and neither doubted what each of them had demonstrated to an astonishing degree in their own lives, namely, people's capacity for a sense of justice and the public good. Their point as constitutional architects was not ultimate moral skepticism, but the permanent tendencies of political power over time that it was reasonable to assume an accept-

²⁴ See, for fuller discussion, Richards, *Foundations*, ch. 2.

²⁵ See Richards, *Foundations*, pp. 32-39.

²⁶ See Richards, *Foundations*, pp. 49-55.

able form of constitutionalism must take seriously as among the facts of man's political nature. The evolving political thought of James Madison—in a memorandum prepared for his use at the Constitutional Convention, speeches at the Convention, correspondence with Jefferson after the Convention, and finally the now classical argument of No. 10 of *The Federalist*—exemplifies how this perspective framed the American project of drafting, debating, criticizing, and ratifying the Constitution.

In his important memorandum, "Vices of the Political System of the United States,"²⁷ Madison analyzed defects not only in the Articles of Confederation but in the state constitutions; in particular, Madison took alarm not only at the bad policies pursued by state laws but their unjust failure to respect rights; such laws brought "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."²⁸ The difficulty was not only in the representative bodies, but, more fundamentally, in the political psychology of the people themselves. The mistake of American republicanism heretofore was that it had, consistent with much Whig opposition thought, focussed on the political corruptibility of government officials, not on the corruptibility of the people themselves. But the facts of political psychology applied, Madison had come to see, to all political actors; republican government was distinguished by the power it gave the people to be political actors, but it could claim no legitimate exemption from the laws of political psychology; the political power of the people was as subject to these laws as the power of a hereditary monarch or aristocracy. American constitutionalism must, consistent with its commitment to the uses of emancipated religious and political intelligence in service of the rights of human nature, take account of these facts, and frame its task accordingly.

Madison characterized the facts of political psychology pertinent to the American situation in Humean terms²⁹:

²⁷ Robert A. Rutland, et al., eds., *The Papers of James Madison, 1786-1787* vol. 9 (Chicago: University of Chicago Press, 1975), pp. 345-358.

²⁸ "Vices of the Political System," *op. cit.*, p. 354.

²⁹ For discussion of the Humean influence on Madison's thought, see Richards, *Foundations*, pp. 34-35.

"All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors—Rich or poor—husbandmen, merchants or manufacturers—members of different religious sects—followers of different political leaders—inhabitants of different districts—owners of different kinds of property &c &c."³⁰

Such factions, by definition, pursued their own private interests at the expense of any fair weight to the interests and rights of others, and the commitment of republican government to majority rule would allow majority factions untrammelled power to achieve their ends at the expense of the public interest and the rights of minorities.

Madison considered three motives as possible limits on the oppressive power of such majority factions: interest, character, and religion. But, the political psychology of faction was such, especially under the circumstances of republican government, that none of them was constitutionally adequate. The ugly truth about faction was that a person's critically independent judgment, as a person of conscience, about his long-term interests and about justice to others would be distorted and even subverted by his group identifications:

"However strong this motive [respect for character] may be in individuals, it is considered as very insufficient to restrain them from injustice. In a multitude its efficacy is diminished in proportion to the number which is to share the praise or the blame."³¹

Indeed, Madison underscored the special ferocity of this type of fractionalized injustice under republics: the sense of justice in a republican community reflects public opinion, but public opinion "is the opinion of the majority" so that "the standard [of critical public opinion] is fixed by those whose conduct is to be measured by it."³² And religion—so far from being a constraint on majority factions—was often its worst expression:

"The conduct of every popular assembly acting on oath, the

³⁰ "Vices of the Political System," *op. cit.*, p. 355.

³¹ *Id.*, p. 355.

³² *Id.*, p. 355.

strongest of religious Ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets."³³

Madison reproduced and elaborated this argument in his addresses to the Constitutional Convention on June 6³⁴ and June 26, 1787³⁵ and in his letter of October 24, 1787 to Jefferson that both explained and criticized the work of the Convention.³⁶ At the Convention Madison argued that it was not enough that new powers be given the federal government; it must provide:

"more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention."³⁷

The oppressive force of faction was well supported by history and by contemporary examples in America, one example of which Madison acidly brought to stage center:

"We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man."³⁸

A central task of the Constitution was to take seriously the corruptive force of many such factions and "to protect [the people] agst. the transient impressions into which they themselves might be led."³⁹ Madison later wrote to Jefferson in no uncertain terms about the felt need to address the problem of the oppressions of majority factions of minority rights at the state level:

"The injustice of them has been so frequent and so flagrant as to alarm the most stedfast [sic] friends of Republicanism. I am

³³ *Id.*, p. 356.

³⁴ Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1966), vol. I, pp. 134-36, 138-39.

³⁵ Max Farrand, ed., *op. cit.*, vol. I, pp. 421-23.

³⁶ See Robert A. Rutland, et. al., eds., *The Papers of James Madison, 1787-1788* vol. 10 (Chicago: University of Chicago Press, 1977), pp. 206-19.

³⁷ Farrand, *op. cit.*, vol. I, p. 134 (speech of June 6, 1787).

³⁸ *Id.*, p. 135.

³⁹ *Id.*, p. 421 (Madison's later speech of June 26, 1787).

persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects."⁴⁰

Indeed, Madison's main criticism of the Constitution was conceptualized in such terms: it had not gone far enough in affording strong institutional constraints on such majority factions.⁴¹

In *The Federalist* No. 10, Madison defended the Constitution to the nation at large on the basis of the constraints it imposed on "the violence of faction."⁴² Madison defined a faction as follows:

"By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁴³

In his memorandum prepared for the Convention, Madison had earlier pointed to the especially malign force of faction under republican government, namely, its erosion of citizens' capacity for critical moral independence by a public opinion that often is the self-serving opinion of majority factions. The argument of No. 10 generalized this theme.

Republicans valued liberty above all. We know that liberty for Madison⁴⁴ crucially included the inalienable right to con-

⁴⁰ Rutland, ed., *Papers of James Madison* vol. 10, p. 212.

⁴¹ Madison had unsuccessfully defended at the Convention and defends to Jefferson the need for a Congressional negative on the laws of the states. See Rutland, ed., *Papers of James Madison* vol. 10, pp. 209-14.

⁴² Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), p. 56.

⁴³ *The Federalist*, p. 57.

⁴⁴ For the primacy of the right of conscience in Madison's thought about rights, see his 1785 *Memorial and Remonstrance against Religious Assessments*, Robert A. Rutland, ed., *Papers of James Madison* vol. 8 (Chicago: University of Chicago Press, 1973), pp. 295-306, and his 1792 essay, "Property," Robert A. Rutland, et al., eds., *The Papers of James Madison, 1791-1793* vol. 14 (Charlottesville: University Press of Virginia, 1983), pp. 266-68.

science that made possible religious and political emancipation (see earlier discussion), including the exercise of public judgment in drafting and ratifying a constitution. But such liberty "is to faction, what air is to fire, an aliment without which it instantly expires."⁴⁵ The argument of No. 10 has often been interpreted in light of the special emphasis it gives "the most common and durable source of factions, . . . the various and unequal distribution of property."⁴⁶ Its pivotal argument, however, turns on why the uncompromisable republican value placed on liberty of judgment is inconsistent with the kind of uniformity of judgment and action that would preclude faction:

"As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."⁴⁷

In effect, sectarian disagreements (whether religious, economic, or political) will be unleashed by the republican commitment to protection of the liberty of judgment in exercising our faculties ("the first object of government"),⁴⁸ and the disagreements thus unleashed will, under majority rule, lead to sectarian oppression. The argument amplified Madison's earlier theme about the self-subverting character of the untrammelled majoritarianism Americans had associated with republican rule: the subversion of the moral independence of free people by a fractionalized public opinion was generalized to the subversion of republican liberties by the factions that those liberties necessarily unleashed. Some constructive alternatives had to be defined that might transcend the horns of this republican dilemma.

⁴⁵ *The Federalist*, p. 58.

⁴⁶ *The Federalist*, p. 59. See, e.g., Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1941), pp. 14-15, 153-54. For cogent criticism of Beard's interpretation, see Morton White, *Philosophy, The Federalist, and the Constitution* (New York: Oxford University Press, 1987), pp. 74-81.

⁴⁷ *The Federalist*, p. 58.

⁴⁸ *The Federalist*, p. 58.

D. Use of Comparative Political Science

American reflection on the pathologies of political power exemplifies a larger feature of the American constitutional mind, to wit, its absorption in the best available comparative political science (Machiavelli of the *Discourses*, Harrington, Montesquieu, Hume, and the Scottish social and economist theorists—Smith, Ferguson, and Millar).⁴⁹ The Americans of 1787 self-identified themselves—in the sense made familiar by Machiavelli and Harrington⁵⁰—as founders, concerned to use the best political science available to learn from the history of past institutional mistakes in order to construct a better order now; indeed, perhaps more than any other people before or since, they took seriously Harrington's project of designing a written constitution that, in light of such political science, could be an immortal commonwealth for posterity. But, unlike Machiavelli and Harrington, Americans had—in light of the later development of political science in Montesquieu, Hume, and the Scottish theorists—become conspicuously skeptical about the continuing utility of the classical republican models (in particular, Rome and Sparta) that Machiavelli and Harrington so admired.

The American skepticism about the classical republics rested, in part, on their basis in militaristic and imperialistic aims no longer suited to the commercial stage of civilization (like that in America) in which commerce could supply a basis for peaceful and mutually advantageous relations among diverse peoples. The normative heart of the American objection was that the classical republics had blatantly violated the fundamental conditions of legitimate government as such, namely, respect for inalienable human rights. Madison, in particular, expressed this skepticism in terms of distrust of mass political assemblies like the Athenian assembly; such assemblies, lacking any appropriate constraints on political power, give maximum expression

⁴⁹ On Machiavelli's influence on American thought, see Richards, *Foundations*, pp. 147, 287, 289, 295; on Harrington, see *id.*, pp. 100, 101, 102, 115, 124, 132, 147, 287, 289, 295; on Montesquieu, see *id.*, pp. 101, 102, 111, 112, 120, 121, 125, 127, 128, 129, 130, 147, 287, 289, 295; on Hume, see *id.*, pp. 129, 130, 147, 287, 289, 295; on the Scottish social theorists, see *id.*, pp. 56-59.

⁵⁰ See Richards, *Foundations*, pp. 97-101.

to the ferocities of faction, subverting—through the unrestrained political force of group psychology—the moral independence that was, for Madison, fundamental to respect for human rights. Madison puts the point starkly:

“Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob.”⁵¹

Whereas Montesquieu and Hume had used such examples to defend the British Constitution as a preferable form of constitutional government for a large commercial nation in modern circumstances, the American revolutionary and constitutional project was precisely to show that a more legitimate form of constitutionalism than the British was practicable; accordingly, they defined their task as constructing a new kind of republican government that could learn from the excesses of the classical republics without accepting the anti-republican premises of the British Constitution with its hereditary classes (monarch, House of Lords). The use of comparative political science was fundamental to the American enterprise because it enabled them to take up a remarkably intellectually independent stance on the issue before them; it enabled them, for example, to take up the thread lost when the English Civil War was aborted by the Stuart restoration, recapturing the Harringtonian dream of an immortal republican commonwealth which Britain had forgotten; on the other hand, the Americans gave a quite independent interpretation to how that project should—in light of Montesquieu and Hume—be understood in contemporary circumstances, but one itself not hostage to Montesquieu’s and Hume’s own preferences for the British Constitution.⁵²

E. American Political Experience

Americans tested their constitutional minds not only against past political history, but against their own democratic

⁵¹ *The Federalist*, p. 374.

⁵² Hume’s utopian republican essay, “Idea of a Perfect Commonwealth” did, however, play an important role in shaping Madison’s thought. For fuller discussion, see Richards, *Foundations*, pp. 111-114. For Hume’s essay, see David Hume, *Essays Moral, Political, and Literary* (Oxford: Oxford University Press, 1963), pp. 499-515.

political experience both before and after the revolution. Americans had working democracy as colonies, and, after the revolution, had engaged in a wide range of constitutional experiments at the state level and the Articles of Confederation at the national level. The drive to the 1787 Constitution was the conviction that these experiments, both state and national, had not respected the principles of political legitimacy they had invoked against the British Constitution.⁵³ Jefferson objects, for example, to the Virginia Constitution that it rested on a legislative despotism as bad as that of parliamentary supremacy,⁵⁴ and the Articles of Confederation had been discredited by their failures both to limit state power oppressive of human rights and their failure to develop a coherent and effective conception of the national interest.⁵⁵ The 1787 Convention critically invoked the lessons of the now discredited state and federal constitutions, and looked hopefully to those state constitutions (notably, John Adams's Massachusetts structures as well as those of New York and Maryland) that appeared, by comparison, to afford effective constitutional constraints.⁵⁶

F. American Constitutionalism as Self-Conscious Work of Political Reason

Americans think of their constitutional responsibility in terms of using their remarkable political opportunity in 1787 to bring to bear the lessons of political experience on the self-conscious design of a new experiment in republicanism: an enduring commercial republic in a large territory that would respect human rights. Both James Wilson and Alexander Hamilton celebrate America as enjoying a unique historical opportunity,⁵⁷ and offer their arguments to one of the most free and democratic processes of constitutional reflection that the world had yet seen. Importantly, Americans resist the Machiavellian picture of

⁵³ See Richards, *Foundations*, pp. 19-20.

⁵⁴ See Thomas Jefferson, *Notes on the State of Virginia* William Peden, ed. (New York: W.W. Norton, 1954), p. 120.

⁵⁵ See, in general, Jack N. Rakove, *The Beginnings of National Politics* (Baltimore: The Johns Hopkins University Press, 1979).

⁵⁶ See Richards, *Foundations*, p. 106.

⁵⁷ See Richards, *Foundations*, p. 23.

political ruthless founders, favoring instead a process of deliberative reflection about constitutional construction whose legitimacy ultimately depends on deliberative ratification.⁵⁸ Americans innovate a new kind of political structure, namely, conventions exclusively called for the purpose of constitutional construction and special procedures of democratic ratification of the work of those conventions.⁵⁹ This structure is sharply distinguished from ordinary politics by the nature and subject of its reflections, in particular, by the kind of deliberative ratification to which it is subjected. These special procedures crucially marked for Americans the special status of constitutional argument that distinguished it from arguments of ordinary politics. In effect, the ratification procedures appropriate to constitutional argument gave institutional expression to the Lockean political legitimacy of the constitution itself: because the Constitution had been subjected to such deliberative ratification, it could be reasonably regarded as having satisfied the ultimate test for the legitimacy of political power, namely, that political power could be reasonably justified to all subject to that power as consistent with respect for their human rights and the use of such power to pursue the common interests of all alike.⁶⁰ Constitutional argument is for Americans supreme over ordinary political argument because it is reasonably regarded as expressive of this kind of authoritative collective democratic deliberation on permanent issues of the legitimate use of political power.

From this abstract deliberative perspective, Americans accept the justiciability of the three great structural innovations of American constitutionalism (federalism, the separation of powers, and judicial review)⁶¹ on the ground that they reasonably respond to the republican dilemma, namely, they divide and limit corruptible political power (including the exercise of majority rule) in service of uses of political power more likely over-all to respect human rights and serve the public good; understandably, Americans also require that interpretation of issues of con-

⁵⁸ See Richards, *Foundations*, pp. 97-105.

⁵⁹ See Richards, *Foundations*, pp. 92-97.

⁶⁰ See Richards, *Foundations*, pp. 131-57.

⁶¹ See Richards, *Foundations*, pp. 105-30.

stitutional design must call for a kind of deliberation that is institutionally distinguished from ordinary politics.⁶² Americans gravitate to judicial review as an institution more likely to secure such deliberation,⁶³ and to a demanding amendment procedure more likely to secure such reflection over time. The American Constitution has, in fact, been rarely amended, and some of its most important amendments (notably, the Reconstruction Amendments) address defects in the original Constitution of which the founders were often all too painfully aware (in particular, the legitimacy of slavery).⁶⁴

II. FRENCH AND AMERICAN REVOLUTIONARY AND CONSTITUTIONAL THOUGHT COMPARED

American and French revolutionary and constitutional thought share a common vocabulary of human rights, but interpret it in quite different ways and with quite different modes of constitutional analysis. For example, each of the forms of analysis that distinguish American constitutionalism do not exist or do so in radically distinguishable ways than French constitutionalism.

There is no correlative feature of French constitutional thought to the American melding of arguments of rights with interpretive analysis of its previous historical constitution, the British Constitution. It is not at all unreasonable that there should have been such a historical component to French constitutionalism. It is, of course, quite true that the French had no practical experience in democratic politics of a sort that America had enjoyed under the British Constitution, and could not therefore reflect on its own practical experience in thinking about democratic constitutional forms. But Montesquieu had prominently defended the historical role of the *parlementaires* in enforcing constitutional constraints against the French monarchs, had implicitly criticized the absolute monarchy established by Louis XIV in light of his historical argument, and had urged the revival of this historical institution in contemporary

⁶² See Richards, *Foundations*, ch. 4.

⁶³ See Richards, *Foundations*, pp. 126-30.

⁶⁴ See Richards, *Foundations*, ch. 7.

circumstances as an active constraint on monarchical despotism.⁶⁵ He had also brilliantly developed a comparative political science, quite influential on the Americans, that urged realism in thinking about constitutional forms in terms of contemporary circumstances, not in terms of anachronistic historical forms (like the classical republics) that were irrelevant today. The Estates General in 1789 could easily have been self-interpreted in light of Montesquieu's views as an inchoate form of the constitutional structures Montesquieu admired so much in Great Britain, and his arguments of comparative political science could have lent a sober realism to reflections on contemporary French circumstances. Indeed, Mounier roughly took this line (against Sieyes) in the Constituent Assembly of 1789.⁶⁶

In fact, both the substance and methodology of Montesquieu's constitutionalism were quickly rejected, and French constitutional thought sets itself in a direction supposed to be radically discontinuous with French history. Even a suspensive veto for the monarch is resisted (though eventually accepted),⁶⁷ and French constitutional thought, once a republic is established, resists any form of strong independent executive that would remind them of the now discredited monarchy. The Girondist project of an executive council independently elected by the people is thus violently rejected by Saint-Just as "the most dangerous threat of all to the unity of the Republic and popular sovereignty";⁶⁸ and when the 1795 constitution adopts an executive, it is a five person executive council (the Directory) elected by the legislative branches.⁶⁹ Those who disown history are proverbially doomed to repeat it, and it is surely an important confirmation of this truth that probably the most enduring political legacy of the French Revolution was the bureaucratic centralism fostered by the French monarchy and perfected under Bonaparte's dicta-

⁶⁵ For a good general treatment, see Judith N. Shklar, *Montesquieu* (New York: Oxford University Press, 1987).

⁶⁶ See R.R. Palmer, *The Age of the Democratic Revolution*, vol. 1, pp. 489-500.

⁶⁷ For a good discussion of the debates surrounding the 1791 constitution, see Keith M. Baker, "Constitution," in Furet, *Critical Dictionary*, pp. 479-93.

⁶⁸ J.L. Talmon, *The Origins of Totalitarian Democracy* (Harmondsworth, Middlesex: Penguin, 1952), p. 103.

⁶⁹ See William Doyle, *Oxford History of the French Revolution*, p. 319.

torship.⁷⁰ Indeed, Bonaparte's quite popular dictatorship may be regarded as the return of the repressed, the vengeance of a French constitutional history of absolute monarchy on a generation obsessed by its total repudiation. From this perspective, Bonaparte, unlike the republicans, better understands the force of history when he gives the French what they had come to expect of government, namely, the competent absolute monarchy that the Bourbons had proved unable to give them.

Correspondingly, French constitutional thought learns little from the brilliant political science of comparative constitutionalism of one of its most penetrating constitutional thinkers, Montesquieu.⁷¹ Montesquieu had urged the importance of commerce in contemporary circumstances as a pacifying agent of mutually advantageous relations among peoples; and he had suggested that the classical republics, focussing on militaristic imperialism, were anachronistic today, urging, instead, competing centers of power that would appropriately moderate the excesses of political power in service of a humane respect for personal security.⁷² French revolutionary constitutionalists ignore the sage wisdom of Montesquieu's constitutionalism, supposing, unlike the Americans, that his rejection of republicanism in contemporary circumstances disqualified him from making any contribution to constitutional thought (as if republican constitutionalism need not worry—a tragically false supposition in view of the Terror—about the paralyzing, debilitating, and stifling abuses of power that so shaped Montesquieu's political theory and science). French constitutionalists are moved, instead, as we shall see, by Rousseau's quite pure-hearted advocacy of republicanism, and some of them are fatefully attracted by the model of classical republicanism defended by Rousseau.⁷³ Whereas the Americans use Montesquieu and Hume in distinguishing their own project from classical republicanism, the French embrace this latter model, including its legitimation of militaristic impe-

⁷⁰ Cf. Alexis de Tocqueville, *The Old Regime and the French Revolution* Stuart Gilbert trans. (Garden City, N.Y.: Doubleday Anchor, 1955).

⁷¹ See Bernard Manin, "Montesquieu," in Furet, *Critical Dictionary*, pp. 728-41.

⁷² For a good treatment of these points, see Thomas L. Pangle, *Montesquieu's Philosophy of Liberalism* (Chicago: University of Chicago Press, 1973).

⁷³ See Bernard Manin, "Rousseau," in Furet, *Critical Dictionary*, pp. 829-43.

rialism (in particular, the European wars of liberation fought by the republican armies of France). Constant's later analysis of the liberty of the ancients and moderns was centrally a criticism of this anachronistic way of thinking and its disastrous consequences for a French constitutionalism ostensibly committed to human rights.⁷⁴ The Americans had seen the point earlier, and made it quite central to their constitutional enterprise.

The kinds of extensive empirical and historical inquiries that concern American constitutionalists were not a French concern, a point that John Adams had made against Turgot in 1787-1788.⁷⁵ Adams objected to the French constitutionalism that later developed in the same terms, taking particularly bitter objection to the perfectionist strain in French constitutional thought, its Rousseauian belief that human nature under republicanism would be transformed in ways that would obviate fears of a mass psychology hostile to respect for human rights.⁷⁶ American republican experience was quite to the contrary, and Adams thus linked the non-empirical grounding of the French institutions to their lack of concern for the pathologies of political power, which was, as we have seen, a central American concern.

Finally, the U.S. Constitution of 1787-1788 innovated a status for constitutional argument distinct from ordinary politics and supreme over it; the French did not. French constitutional thought certainly did not share the Harringtonian dream of an immortal commonwealth for posterity that so moved leading American constitutionalists like Madison; their thought was much closer to Jefferson's defense (in one of his few disagreements with Madison)⁷⁷ of a constitution newly made by each

⁷⁴ See Benjamin Constant, "The Liberty of the Ancients Compared with That of the Moderns," in Biancamaria Fontana, ed., *Constant: Political Writings* (Cambridge: Cambridge University Press, 1988), pp. 308-28.

⁷⁵ See John Adams, *A Defence of the Constitutions of Government of the United States of America*, op. cit., circa.

⁷⁶ See, e.g., John Adams, *Discourses on Davila*, in Charles Francis Adams, ed., *The Works of John Adams* (Boston: Little, Brown, 1851), vol. VI, at p. 279. See, in general, Zoltan Haraszti, *John Adams and the Prophets of Progress* (Cambridge, Mass.: Harvard University Press, 1952).

⁷⁷ See Richards, *Foundations*, pp. 102, 103, 105, 132, 134, 136, 142, 156, 180, 288, 289.

generation; surely, the five republics of French constitutional history (with intervening dictatorships, restorations of monarchy, etc.), in contrast to the continuous written constitution of the Americans, suggest Jefferson's approach.⁷⁸ But that, in itself, cannot explain the French failure to develop an independent status for constitutional argument; constitutions, newly made each generation, can certainly—as Jefferson argued they must—immunize constitutional from ordinary political argument.

Americans did not have to struggle with an issue of much concern to French constitutionalists, namely, background consensus. Americans had, in contrast to the French, developed a strong national consensus on republican values and thus did not think of constitutionalism as a way of creating such values; their constitutional debates were thus not over how to forge republican consensus, but over the constitutional forms most adequate to preserve and elaborate that consensus over time. But the need to forge a republican consensus is not inconsistent with the development of a distinctive role for constitutional argument. Americans might very well have taken this goal more seriously, and much better served their posterity than they did. American constitutional thought in 1787-1788 may have become too complacent about the independent power of this republican consensus; their toleration, for example, of the republican abomination of slavery may have rested on the quite wrong-headed idea that the republican consensus in the country could be depended on to end slavery.⁷⁹ In the light of history, that was a tragic misunderstanding of the proper role of republican constitutionalism in maintaining a commitment to basic republican principles, leading to a civil war which cost more American lives than any other military conflict in American history.⁸⁰ At this juncture, the

⁷⁸ See, in general, Alfred Cobban, *A History of Modern France* in 3 vols. (Harmondsworth, Middlesex: Penguin, vol. 1, 1963, vol. 2, 1965, vol. 3, 1965).

⁷⁹ See Herbert J. Storing, "Slavery and the Moral Foundations of the American Republic," in Robert H. Horwitz, ed., *The Moral Foundations of the American Republic* 3d ed. (Charlottesville: University Press of Virginia, 1986), pp. 313-332. But cf. Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in Richard Beeman, et al., eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987), pp. 188-224.

⁸⁰ See James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York:

American constitutionalists of 1787-1788 might well have profited from a greater dosage of the republican idealism of the French revolutionary constitutionalists, who did not, because they could not, separate the questions of republican consensus and constitutionalism.

The French, like the Americans, were committed to the idea of republican constitutionalism, which surely must embody some kind of operative distinction between constitutional and ordinary political argument. However, the constitutional forms they did develop were notoriously distorted by ordinary political argument in a way that self-destructively aborted the practicability in France during this period of establishing a tradition of republican constitutional argument with a force supreme over ordinary political argument. In effect, French constitutionalism was stillborn, because it fatefully confused constitutionalism with ordinary politics. That suggests a self-defeating contradiction at the very heart of the French revolutionary and constitutional project. It will be the burden of my concluding argument that this contradiction was implicit in the way the French interpreted the normative conception of popular sovereignty they shared with the Americans.

III. POPULAR SOVEREIGNTY IN FRENCH CONSTITUTIONALISM

French revolutionary and constitutional thought certainly rests on the idea of inalienable human rights and, if necessary, the right of revolution in defense of those rights. Indeed, the French constitution of 1791, in contrast to the American Constitution of 1787-1788, is prefaced by the Declaration of Rights of Man and Citizen⁸¹ (though certain rights are guaranteed by the U.S. Constitution, the most important rights are protected by the 1791 amendments that we now call the Bill of Rights). American state constitutions, including the important Virginia constitution of 1776,⁸² were, however, often prefaced by bills of rights, and the French may, in this matter, have taken instruc-

Ballantine Books, 1988), at p. 854.

⁸¹ See Marcel Gauchet, "Rights of Man," in Furet, *Critical Dictionary*, pp. 818-828.

⁸² Francis Newton Thorpe, *The Federal and State Constitutions* vol. VII (Washington, D.C.: Government Printing Office, 1909), at pp. 3812-19.

tion from the American state constitutions, with which they were well familiar.⁸³ For both the French and the Americans, the protection of the inalienable rights of the person is clearly fundamental both to their revolutionary and constitutional thought. Differences appear, on this issue, to be largely matters of expository style.⁸⁴ To understand the real differences between American and French revolutionary constitutionalism, we must repair to the deeper examination of the normative perspective they share. The idea of republican constitutionalism—which both America and France share—rests on an abstract political theory of legitimate government, namely, that legitimate political power must respect the status of each person as an equal bearer of inalienable rights and common interests.⁸⁵ That political theory, often called popular sovereignty, supposes that political power, in order to be legitimate, must be justified and be seen to be justified in terms of the ultimate moral sovereignty of persons understood to be free and equal bearers of rights. Both the Americans and the French share this political theory and the associated view that many traditional forms of political authority (in particular, absolute monarchy) were illegitimate on such grounds. For this reason, it is importantly true that both American and French revolutionary and constitutional thought share the enlightenment idea that much traditional political power had corruptly deprived people of their capacity to know, let alone claim, the equal rights of their human nature; and both therefore invest the idea of constitutionalism with the moral urgency of so reordering political relations that people are emancipated from such unjust servility and subjugation into a sense of themselves as free and equal bearers of rights.

That common emancipatory impulse was, for both the

⁸³ See Marcel Gauchet, "Rights of Man," *op. cit.*, at p. 819.

⁸⁴ See R.R. Palmer, *The Age of the Democratic Revolution*, vol. 1, at pp. 487-488; Thomas Paine, *Rights of Man* Henry Collins ed. (Harmondsworth, Middlesex: Penguin, 1969), at pp. 132-34. For additions made by the constitution of 1793 (much in the spirit of Jacobin direct democracy), see James Miller, *Rousseau: Dreamer of Democracy* (New Haven: Yale University Press, 1984), p. 154.

⁸⁵ For fuller discussion of this conception, see David A.J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

Americans and French, a moral vision. Illegitimate political power had, on this view, flourished because it had systematically degraded the moral powers of persons to be morally independent originators of reasonable thought and deliberation about both personal and ethical life, let alone about their just claims on the political order.⁸⁶ In effect, structures of political power had embedded people in unquestioned and unquestionable hierarchies of deference and submission in which the order of personal, ethical, and political life was imposed and specified by the place of persons in the hierarchy. The deepest damage of such illegitimate political power was its corruption of ethics: people were disabled from experiencing their personal powers as morally accountable creative agents living a complete life in a community of free and equal persons. Both American and French revolutionary and constitutional thought interpret their project as establishing a political community of popular sovereignty in which people would be emancipated from such illegitimate political power and thus be capable of such moral independence and sovereignty. On this point, John Adams expressed views quite similar to those he had read in Jean-Jacques Rousseau.⁸⁷

Popular sovereignty is, however, an essentially contestable normative concept, subject to a range of different and often conflicting interpretations.⁸⁸ Much that is crucial to the distinctive constitutional trajectories of America and France must be understood from the perspective of the different interpretations each nation accorded the foundational normative concept they both conspicuously shared.

Americans crucially adopt, consistent with their religious traditions, a Protestant interpretation of popular sovereignty. Their political theory of popular sovereignty is clearly that of Lockean contractualism: political power is legitimate only if it

⁸⁶ See Richards, *Foundations*, pp. 24-32.

⁸⁷ See John Adams, "A Dissertation on the Canon and Feudal Law," in Charles Francis Adams, ed., *Works of John Adams* (Boston: Little, Brown, 1851), vol. 3, pp. 448-74. Adams had read Rousseau's *The Social Contract* as early as 1765 and its vocabulary (if little else of its constitutionalism) influenced him. See R.R. Palmer, *The Age of the Democratic Revolution*, vol. 1, pp. 223-224.

⁸⁸ See W.B. Gallie, "Essentially Contested Concepts," in *Philosophy and the Historical Understanding* 2nd ed. (New York: Schocken Books, 1968), ch. 8.

could be reasonably justified to all as consistent with their inalienable human rights (in particular, the right to conscience to which Locke and the Americans give such prominent weight).⁸⁹ But respect for the right to conscience carried with it, as we have seen, a probing analysis of the corruptibility of political power by sectarian convictions, and Lockean constitutionalism, which generalized the argument for religious toleration to political power as such, interpreted the normative demands of popular sovereignty accordingly. That interpretation had two crucial features: first, a theory of human nature in politics as fundamentally flawed (the theories of faction and of fame), and second, a theory that all political institutions are tainted by such flaws and must be treated skeptically. American constitutionalism, as we have seen, was for this reason a kind of meta-reflection on the corruptibility of all forms of political power (including republican political power) and the appropriate constraints on political structures that might, in light of both American political experience and the best political science available, be more likely to constrain the corruptibilities of political power in ways that would over-all tend to treat persons as equal bearers of rights and of common interests. The American idea of constitutionalism thus interprets popular sovereignty as imposing a sufficiently complex and demanding system of constraints on political power that will, in the interstitial space left by the competing and mutually checking centers of corruptible political power, accord people a fair opportunity and capacity to know and to claim their inalienable rights of reasonable self-government and hold political power accountable to them.

Both French revolutionary and constitutional thought were, of course, much preoccupied with the criticism and rectification of what they took to be the wholly corrupt complicity of the Catholic Church in the legitimation of the absolute monarchy.⁹⁰ But the religious and political history, which the French revolutionary constitutionalists struggled totally to repudiate, set the stage (in the same way that I earlier characterized as the return

⁸⁹ See Richards, *Foundations*, pp. 78-97.

⁹⁰ See Mona Ozouf, "De-Christianization," in Furet, *Critical Dictionary*, pp. 20-32; Francois Furet, "Civil Constitution of the Clergy," *id.*, pp. 449-57.

of the repressed) for the distinctive interpretation they accorded popular sovereignty, an interpretation I would call Catholic. That designation characterizes two features of French revolutionary and constitutional thought: first, its conception of the basic good of human nature which illegitimate politics had warped, and second, its assumption that republican institutions, properly designed consistent with human nature thus understood, could themselves be depended on to accomplish the work of regenerating human nature and thus create a community of free and equal persons. In effect, properly designed republican institutions could be depended on to create or restore a human nature now free of all corruptibility.

The political theory of Jean-Jacques Rousseau gave a powerful imaginative expression to the interpretation of popular sovereignty that absorbed French republican thought.⁹¹ No writer in France more piercingly articulated for French revolutionary and constitutional thinkers the indignities that the ancien regime inflicted on human nature nor more powerfully appealed to their moral imaginations as an example of the morally independent expression of the rights of human nature, a republican (unlike Voltaire),⁹² who, on grounds of the rights of the common man, had refused to toady to a corrupt political order.⁹³ Rousseau spoke to the French about the depth and extent of their corruption, including not only in politics but the family⁹⁴ and intimate life⁹⁵ and the authenticity and integrity of personal emotion, thought, and deliberation;⁹⁶ and he suggested the kinds of transformations of education and family life, as well as of politics, that would be required to reassert the rights of human

⁹¹ See Bernard Manin, "Rousseau," in Furet, *Critical Dictionary*, pp. 829-43; Keith M. Baker, "Sovereignty," *id.*, pp. 844-59.

⁹² See Mona Ozouf, "Voltaire," in Furet, *Critical Dictionary*, pp. 869-78.

⁹³ For a sympathetic treatment of Rousseau from this perspective, see Judith N. Shklar, *Men and Citizens: A Study of Rousseau's Social Theory* (Cambridge: Cambridge University Press, 1985).

⁹⁴ Jean-Jacques Rousseau, *Emile* Barbara Foxley trans. (London: J.M. Dent & Sons, 1961).

⁹⁵ See Jean-Jacques Rousseau, *La Nouvelle Heloise* Judith H. McDowell trans. (University Park, Penn.: Pennsylvania State University Press, 1988).

⁹⁶ See Jean-Jacques Rousseau, *The Confessions* Lester G. Crocker ed. (New York: Pocket Books, 1956).

nature. No writer was, at once, so incisively personal and so uncompromisingly politically republican in shaping the French sense of the immensity of the task before them.

French revolutionary and constitutional thought—fired by a moral vision of popular sovereignty—faced a far more intractable political history than the Americans, in particular, the residues of anti-republican prejudices left by an absolute monarchy and an aristocracy whose loss of effective political power had led to an all the more insulting insistence on their prerogatives as superior to those of common people. Americans had long lived a life of democratic equality that their revolution reaffirmed and elaborated; the French had lived in a political order of arbitrary privilege that their revolution had both to end and regenerate. American constitutionalism elaborated an already existing consensus on republican government; the consensus in France was, in comparison, much more insecure and unstable. Rousseau appealed to French republicans precisely because he, more than any other thinker, anatomized the corruption of morality that the illegitimate political order had inflicted on the human heart and mind, and articulated an alternative vision of popular sovereignty that promised, as if magically, the requisite moral regeneration. Both the diagnosis of human goodness (corrupted by illegitimate politics) and the remedy of regenerative political action gave the French the theory they believed they needed.

Rousseau had, of course, given his political theory contractualist expression in terms of the abstract political ideal he called the General Will, against which the legitimacy of political power was to be tested.⁹⁷ That political ideal is probably best understood, as Kant was later to interpret it,⁹⁸ as an abstract test of legitimate government, namely, that political power was only legitimate when it could be reasonably justified to all those

⁹⁷ See Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and Discourses* G.D.H. Cole trans. (New York: Dutton, 1950), pp. 3-141. For pertinent commentary, see Roger D. Masters, *The Political Philosophy of Rousseau* (Princeton, N.J.: Princeton University Press, 1968).

⁹⁸ See Immanuel Kant, "On the Common Saying: 'This May be True in Theory, but it does not Apply in Practice,'" in Hans Reiss, ed., *Kant's Political Writings* (Cambridge: Cambridge University Press, 1970), pp. 61-92. Kant calls the conception "an idea of reason," *id.*, p. 79.

subject to political power as consistent both with their rights and the use of power for the public good. Such an abstract test would be a kind of criterion against which any political order or action could be tested for legitimacy. On this view, when Rousseau insists that the General Will cannot be represented⁹⁹, he is making a point that, from his perspective, applies to any polity: the legitimacy of the polity's actions (its justice, for example) must be independently assessed, and no polity can itself be the last word on this question.

Such an abstract theory of political legitimacy is, of course, consistent with a range of constitutional alternatives (Rousseau himself suggested a range).¹⁰⁰ Indeed, a not unreasonable interpretation of it would render it consistent with the very different constitutionalism of the Americans, to whom the Constitution had been justified in very much such terms (namely, that the Constitution was reasonably justifiable to all by virtue of rendering political power consistent with their rights and the common good). But Rousseau interprets this normative ideal in light of both a conception of human nature and of political institutions that leads to a quite different constitutionalism. In particular, in his main work of abstract political theory, Rousseau gave particular prominence to the kind of direct democracy associated with the small city-states of the classical republics.

Rousseau's focus on these models is, like so much of his work, motivated by his concern for instituting the kind of political education that would be the most bracing antidote to the corruption of a basically good human nature and thus enable it, through the discipline of thought and imagination required to think of people as equals, to transform oneself and one's society into a moral community of free and equal persons. Human nature had, Rousseau argued, been corrupted by illegitimate politics and by the kinds of false and empty wants (for example, conspicuous consumption) that it had spawned; in effect, human

⁹⁹ See Jean-Jacques Rousseau, *The Social Contract*, *op. cit.*, at p. 94. For fuller discussion of Rousseau's views on representation, see Richard Fralin, *Rousseau and Representation* (New York: Columbia University Press, 1978).

¹⁰⁰ See, e.g., Jean-Jacques Rousseau, *Consideration on the Government of Poland*, in F.M. Watkins, ed., *Rousseau: Political Writings* (Edinburgh: Thomas Nelson, 1953), pp. 159-274; also, *Constitutional Project for Corsica*, *id.*, pp. 277-330.

nature had become shallow, reactive, and incapable of the reasonable self-government of morally independent agents. The task of a constitutional founder, whom Rousseau—following Machiavelli—identified with an inspired man of power,¹⁰¹ must be a political structure most likely to regenerate human nature. Rousseau, like Madison, saw faction (understood as persons, isolation in parochial and narrow concerns and obsessions) as the root of political pathology; but, unlike Madison, he assumed (human nature being good) that it could be removed, and that political structures must be constitutionally designed accordingly. In effect, the constitutional structures that were most reasonable (*i.e.*, consistent with the General Will) were those that rendered political power most transparent to a people of republican virtue, *i.e.*, a people now capable of moral abstraction and impartiality in service of human rights and the public good. For this reason, simple democratic political forms were always to be preferred over complex because such forms required all people to think together, not as isolated factions; small direct democracies were optimal because they rendered politics more transparent to the republican virtue of the people, who are now both empowered and competent to exercise such virtue; the classical republics (in particular, Sparta and Rome, not Athens) were the best model for such direct democracies because they make the greatest moral demands on people (without the corruptions of either commerce or art) and created a civil religion of the state that reinforced moral commitment and devotion (including, importantly, the military service fundamental to the militaristic imperialism of Machiavelli's vision of classical republicanism).¹⁰²

Madison had, of course, offered arguments (quite well known to French constitutionalists) that the classical republics egregiously violated human rights (he had, however, conceded in a letter to Jefferson that the violations of human rights might be less likely in a quite small, undeveloped, and homogeneous society, the society that Rousseau was imagining).¹⁰³ Rousseau cer-

¹⁰¹ See *The Social Contract*, *op. cit.*, pp. 37-42.

¹⁰² See Mark Hulliung, *Citizen Machiavelli* (Princeton, N.J.: Princeton University Press, 1983).

¹⁰³ See Madison's letter to Jefferson of October 24, 1787, where Madison grants that a "savage" and quite homogeneous small society might not involve the oppression of the

tainly had as strong a sense of the personal dimension of human rights as Madison or indeed any writer of the age, *i.e.*, how such rights establish the foundation of a morally independent and authentic personal self-government, including the kind of critical self-consciousness and privacy that Rousseau exemplified and celebrated in his own life.¹⁰⁴ But he had not made central to his constitutionalism what Madison had generalized from the argument for religious toleration—the tendency of political power to corrupt and subvert moral conscience itself (both the conscience of politicians and of the people). Rather, Rousseau assumed that political power—when structured in an appropriately simple and accountable way—could render politics expressive of the moral competences of self-government of a free and equal people; such politics would, by definition, respect both their rights and the public good. It was therefore a fundamental assumption of Rousseau's constitutionalism that political power under a properly designed republic would remove faction, *i.e.*, make republican political power not subject to the corruptions to which other forms of political power were subject. If it did not, his constitutionalism would, in his own terms, not be legitimate: it would not preserve and foster respect for human rights.

Rousseau's preferred constitutional alternative was, of course, not feasible in the enormous, well-populated, and commercially and culturally advanced France of the late eighteenth century, and the sheer anachronism of his preferred model might lead one to think that his constitutionalism would be regarded, as it was by Americans,¹⁰⁵ as idle. In fact, Rousseau's interpretation of popular sovereignty imaginatively framed French constitutional thought to a remarkable extent. The model for republican constitutionalism was not, as it was for the Americans, complex structures motivated by distrust of both human nature in politics and of institutions, but the simplicity and unity of political power that gave expression to the now

minority by the majority. See Robert A. Rutland, et al., eds., *The Papers of James Madison* vol. 10 (Chicago: University of Chicago Press, 1977), at p. 212.

¹⁰⁴ See, e.g., Rousseau, *The Confessions*, *op. cit.*

¹⁰⁵ See, e.g., Madison's dismissal of "[t]heoretic politicians," *The Federalist*, p. 61. For a useful general study, see Paul Merrill Spurlin, *Rousseau in America 1760-1809* (University, Alabama: University of Alabama Press, 1969).

regenerated and dependable goodness of man's political nature.

Sieyes' seminally important *Qu'est-ce que le Tiers Etat?*¹⁰⁶ thus posed the basic issues for French constitutionalism in Rousseau's terms; he rejected the idea of separate representation of classes in the Estates General precisely because only a unicameral representative body would be a political structure appropriate to the kind of national unity it must have in order to embody the General Will. Sieyes certainly did not agree with Rousseau about the virtues of direct democracy, and argued against the idea (advocated by Rousseau)¹⁰⁷ that representative government, if acceptable at all, must be subject to binding mandates from the people.¹⁰⁸ But Sieyes basically interprets the project of French constitutionalism within the framework of Rousseau's assumptions: the design of a simple political structure that gives transparent expression to the General Will.

Sieyes' argument for a representative system is thus quite different from Madison's. Madison regarded faction as an ineliminable feature of man's political nature in a republican polity committed to respect for human rights, and assumed that guarantees of human rights would foster diverse sources of economic, religious, and moral pluralism (and thus forms of faction). The point was not to eliminate but constructively to use propensities to faction in ways that limit the opportunity for their oppressions and enlarge their utility in serving ends of justice and the common good. Madison's argument for federalism is thus that the representative principle, extended to a sufficiently large territory and heterogeneous population (guaranteed its rights) and expressing different constituencies in constitutionally independent centers of power (a bicameral legislature, independent executive, etc.), would tend to produce a kind of deliberative public argument that finds common ground among these diverse constituencies, and thus be more likely to respect the equal

¹⁰⁶ Emmanuel Sieyes, *Qu'est-ce que le Tiers Etat?* (Paris: Press Universitaires de France, 1982).

¹⁰⁷ See Jean-Jacques Rousseau, *Considerations on the Government of Poland*, *op. cit.*, at p. 193.

¹⁰⁸ For a good statement of Sieyes' views, see Keith M. Baker, "Sieyes," in Furet, *Critical Dictionary*, pp. 313-22.

rights and common interests of all.¹⁰⁹ The application of the representative principle to a supreme unicameral legislature (especially one concerned not to maintain heterogeneity, but to promote homogeneity) would not, for Madison, produce the desirable centers of competing power fundamental to American constitutionalism; it would be likely, rather, to produce simply another form of factionalized majority rule, and thus not address the republican dilemma, *i.e.*, the tendency of majority rule to give unthrottled expression to a factionalized denigration of the rights and interests of minorities. Sieyes' argument is innocent of the republican dilemma and thus of American worries about the corruptibility of political power; he believes, following Rousseau, that an appropriately simple structure of political power would suffice to produce the desirable exercises of political power. Where Madison celebrates heterogeneity and pluralism (including guarantees of religious and moral diversity) as crucial to the aims of representative government, Sieyes emphasizes homogeneity and unity.

This mode of constitutional thinking has the dangerous tendency of encouraging the republican leadership to suppose that it transparently embodies republican virtue either in itself or because it represents the republican virtue of the people; this temptation may be irresistible if you believe that political institutions have now rendered political power in general or your political power in particular incorruptible. In fact, such constitutional argument assumed that its recommendations must be tested against some independent conception of popular sovereignty, and Sieyes indeed was quite clear on this point: the General Will of the nation had an authority independent of and over all constitutional forms.¹¹⁰ But constitutionalism and popular sovereignty, as the French understood them, were an unstable amalgam. If popular sovereignty is independent of any particular form of constitutionalism, then presumably such constitutionalism must be subject to criticism in terms of it. At least the French constitution of 1791 accorded the now constitutional monarch a suspensive veto over legislation in part to allow ap-

¹⁰⁹ See Richards, *Foundations*, pp. 107-19.

¹¹⁰ See Keith M. Baker, "Sieyes," *op. cit.*, at p. 321.

peals to the people against a legislative assembly that had violated the General Will.¹¹¹ With the overthrow of the monarchy in 1792, the issue is posed again without the availability of such a constitutional safety valve.

The issue is, of course, fundamental to the very idea of republican constitutionalism, requiring that political bodies are held to some appropriate accountability to the principles of republican political legitimacy of the constitution itself. In effect, republican constitutionalism aspires to domesticate the revolutionary theory of political legitimacy that brought it to power, holding republican politics to the standards of respect for human rights and the public interest. But the tendency of French constitutional thought to assume that its simple and centralizing political structures had rendered political power benign led it not to take seriously the requirement that it develop constitutional processes that continually subject power to critical assessment in light of whether it was, in fact, politically legitimate. This failure might not have been fatal if, in the highly volatile circumstances of French republican politics, the absence of such processes had not left a perceived vacuum of political legitimacy that an interpretation of their normative theory of popular sovereignty rapidly filled with an agency of republican accountability that undermined the very idea of republican constitutionalism.

Rousseau's preference for direct democracy was at this point interpreted to vindicate a conception of popular sovereignty that justified the role of the Parisian mobs (suitably advised by the political clubs) as the ultimate expression of popular sovereignty and thus as supreme over constitutional processes (in particular, the legislature). Robespierre and Saint-Just—at least when they agreed with the mob—expressed this view.¹¹² Such direct political action was regenerative, in Rousseau's sense, because it allowed the insurrectionary mob to ex-

¹¹¹ See Keith M. Baker, "Constitution," in Furet, *Critical Dictionary*, pp. 479-93.

¹¹² See, for pertinent discussion, Carol Blum, *Rousseau and the Republic of Virtue: The Language of Politics in the French Revolution* (Ithaca: Cornell University Press, 1986), pp. 166-67, 173-74, 198, 249, 273. See also Norman Hampson, *Will and Circumstance: Montesquieu, Rousseau and the French Revolution* (Norman, Okla.: University of Oklahoma Press, 1983).

press its republican virtue. In fact, the mobs were manipulated by one group of the republican leadership against another in a way that was blatantly anti-democratic (for example, excluding the Girondin opposition to the Jacobins from the National Convention)¹¹³ and subverted any reasonable constitutional processes about the limits on state power required by respect for human rights and the public good.

The political forces unleashed by this development framed the constitutional debates in 1793 over the proposed Girondin constitution of Condorcet and the enacted but never effective Montagnard constitution of the Jacobins. Condorcet, very much a constitutionalist in the spirit of Sieyès's deliberative legislative processes, designed a complex system of local assemblies that would give constitutional power to such assemblies to force the national legislature to consider legislation and, if refused, to dissolve the legislature and call new elections; in effect, constitutional powers would be given local assemblies to eliminate the temptation of the Parisian crowd to exercise the direct right of popular sovereignty by force of insurrection.¹¹⁴ The Montagnard constitution, consistent with Jacobin direct democracy, gave local assemblies a power to reject national legislation, to revoke and reelect deputies, and affirmed the people's right to resist oppression.¹¹⁵

These constitutional debates did not resolve the issue; the direct political response of the National Convention was the Terror, the attempt to substitute for the insurrectionary violence of the mob the more terrible power of the state against any form of suspected disloyalty.¹¹⁶ Its political theory is yet another interpretation of the twin assumptions of Rousseauian constitutionalism, a human nature warped by the effects of political illegitimacy, and a political power that could regenerate it. Robespierre was clear on these points:

¹¹³ See Mona Ozouf, "Girondins," in Furet, *Critical Dictionary*, pp. 351-61.

¹¹⁴ For a useful discussion, see Keith M. Barker, "Condorcet," in Furet, *Critical Dictionary*, pp. 204-12.

¹¹⁵ See J.L. Talmon, *The Origins of Totalitarian Democracy*, at p. 104; James Miller, *Rousseau: Dreamer of Democracy*, pp. 153-56.

¹¹⁶ See Francois Furet, "Terror", in Furet, *Critical Dictionary*, pp. 137-50.

"the strength of popular government in revolution is at once *virtue* and its emanation *terror*: terror without virtue is malignant; virtue without terror is impotent."¹¹⁷

The Terror can hardly be regarded as a realistic response to external and internal threats to the republic when its greatest excesses took place when these threats were no longer realistic.¹¹⁸ The Terror, rather, was driven by a *reductio ad absurdum* of Rousseau's constitutionalism of regenerative political power, driven by the self-righteous belief of men intoxicated by power that the discipline of the Terror was itself incorruptible and could render others incorruptible. The Rousseauian idea of the incorruptibility of republican political power had become, for Robespierre, identified with his own incorruptibility, and that conviction had, in turn, legitimated his conviction that he spoke for and could identify the incorruptible virtue of the people. One of the articles that the 1793 constitution adds to the earlier Declaration of the Rights of Man and Citizen drew the conclusion that justified the Terror: any dissenter from republic virtue, presumably as Robespierre transparently identified him, was guilty of "usurping the sovereign [and] should be immediately put to death by free men."¹¹⁹

The Terror was, of course, extreme and soon repudiated. But the theme of moral pedagogy, of which the Terror is the most dramatic example, pervaded French revolutionary and constitutional thought precisely because the aims of that thought were so absorbed by the search for the uses of political power that would render it transparent to republican virtue. That gave French revolutionary argument the violent self-righteousness of rhetoric (mirrored in the grisly violence of David's republican art)¹²⁰ that anticipated and set the stage for its later violence of action.¹²¹ The very way it understood the aims of its constitu-

¹¹⁷ Cited in Carol Blum, *Rousseau and the Republic of Virtue: The Language of Politics in the French Revolution* (Ithaca: Cornell University Press, 1986), at p. 259.

¹¹⁸ For a good discussion of this point, see Simon Schama, *Citizens: A Chronicle of the French Revolution* (New York: Knopf, 1989), pp. 726-92.

¹¹⁹ See James Miller, *Rousseau: Dreamer of Democracy*, p. 154.

¹²⁰ See, e.g., Jean Starobinski, *1789: The Emblems of Reason* Barbara Bray trans. (Charlottesville: University Press of Virginia, 1982), pp. 99-124.

¹²¹ This is a prominent theme of Simon Schama's excellent study of these events.

tionalism led French republican thought disastrously and uncritically to assume that republican political power (whether of the state or of the people) was self-justified and to fail to hold itself accountable to reasonable independent standards of legitimate republican government.

This incoherence subverted the central enterprise of French revolutionary constitutionalism, its drive for the political reeducation of the French people into an enduring consensus of republican principle. The republican leadership, convinced of its own republican virtue, used its political power in increasingly sectarian ways that, over time, imposed even on republicans tests of loyalty that made it impossible for there to be any acceptable politics of the loyal opposition. The seeds of this problem were implicit in the decision of the French republic about how, in contrast to the Americans, it would treat religion. The comparison of the American and French views is instructive, for it suggests that the difficulties in French constitutionalism were implicit in the earliest constitutional consensus of the republican leadership well before they began their descent into division, re-crimination, and the hell that was the Terror.

It was a decisively important fact in the distinctive formation of American constitutionalism that Americans, following Locke, regarded religious beliefs, properly understood, as vehicles of moral and political emancipation.¹²² Locke and his American posterity thus faced frontally the central puzzle for religious Christians and democrats: that a religion like Christianity (a religion for Locke of democratic equality and civility) had long been associated in the West with the legitimation of antidemocratic institutions like hereditary monarchy. Lockean Americans thus confronted the tension in traditional Christianity between a conception of radical freedom from existing roles and the coercive claims (for example, heresy prosecutions) of the Christian political community over the minds and hearts of people.¹²³ This critical interrogatory was particularly poignant for

See Simon Schama, *Citizens: A Chronicle of the French Revolution* (New York: Alfred A. Knopf, 1989).

¹²² See, in general, Alan Heimert, *Religion and the American Mind: From the Great Awakening to the Revolution* (Cambridge: Harvard University Press, 1966).

¹²³ For an illuminating recent study of this tension from the perspective of issues of

Locke and the Lockean revolutionary and constitutionalist Americans a century later since they believed that a properly understood Protestant Christianity supplied the ethics of personal self-government which made possible the theory and practice of democratic self-government. How, for long millennia, could Christianity have thus betrayed its essential emancipatory purposes, degrading a just human freedom into acceptance of morally arbitrary hierarchies of religious and political privilege and power?

The American constitutional tradition chose to answer the interrogatory in a way that repudiated the alternative Erastian conception of civil religion familiar to the American founders in the classical republican tradition elaborated by Machiavelli¹²⁴ and Rousseau.¹²⁵ The challenge to all republican theorists after the ancient world was to understand whether and how republican political practice could exist in a nonpagan world—in particular, in the world of commitment to the Judaeo-Christian religious synthesis. After all, the great historical examples of republican rule—Athens, Sparta, Rome, Carthage, and the like—were all pre-Christian or pagan societies, and the reawakening of interest in republican theory and practice in the Renaissance naturally posed the question whether and how republicanism could be squared with Christian commitments.

The classical republican answer by Machiavelli, Rousseau, and Marx¹²⁶ was the Erastian conception of civil religion, an established church regulated by state power to appropriately emancipatory ends. On this analysis, the great defect in the relationship of church and state since Constantine was the independence of the church from state control, and its consequent capacity to corrupt republican aims and values by theocratically defined ends. This view was naturally, though not inevitably,

gender, see Elaine Pagels, *Adam, Eve, and the Serpent* (New York: Random House, 1988).

¹²⁴ See Machiavelli, *The Discourses* Bernard Crick ed., Leslie J. Walker trans. (Harmondsworth: Penguin, 1970), pp. 139-52.

¹²⁵ See Rousseau, *The Social Contract and Discourses* G.D.H. Cole trans. (New York: Dutton, 1950), pp. 129-41.

¹²⁶ See Karl Marx, *On the Jewish Question*, in *Karl Marx: Early Writings* T.B. Bottomore trans. (London: C.A. Watts, 1963), pp. 1-40.

linked to the kind of Voltairean anticlericalism familiar to Europeans from republican Venice and Florence and the associated classical republican tradition revived by Machiavelli.¹²⁷ On this view, Judaeo-Christian values, whatever their truth value, were intrinsically dangerous, and must be cabined and tamed to the ends of secular authority by the assertion of supreme secular authority over religious life on the model of Roman or Spartan civil religion. Even the political science of Montesquieu and Hume—although not endorsing classically republican civil religion—supported Erastian established churches.¹²⁸

Americans like Jefferson and Madison gravitated to a quite different constitutional conception that culminated in the religion clauses of the first amendment¹²⁹ because they took a different view of how Judaeo-Christian belief and republican values interconnected, namely, the familiar American union of equally intense personal religiosity and republicanism. On this view, stated by Locke, the essential moral message of Christian belief—namely, the democratic liberty and equality of all persons—was supportive of republican values of equal liberty under law, but had been corrupted from its proper supportive role by Constantine's wholly heretical and blasphemous establishment of Christianity as the church of the Roman Empire. The problem was not that Constantine had opted for the wrong form of established church—one subordinating secular to religious authority—but that, as Americans like Jefferson and Madison came increasingly to see,¹³⁰ he had wedded religious to secular authority *at all*. A more radical separation of religious and polit-

¹²⁷ See William J. Bouwsma, *Venice and the Defense of Republican Liberty* (Berkeley: University of California Press, 1968), pp. 1-51, 417-638. For a good general study of Machiavelli's subversive attitude to Christian thought and practice, see Mark Hulliung, *Citizen Machiavelli* (Princeton: Princeton University Press, 1983).

¹²⁸ For commentary on Montesquieu's Erastian conception of religion, see, Thomas L. Pangle, *Montesquieu's Philosophy of Liberalism* (Chicago: University of Chicago Press, 1973), pp. 249-59. On Hume, see David Miller, *Philosophy and Ideology in Hume's Political Thought* (Oxford: Clarendon Press, 1981), pp. 117-18.

¹²⁹ See, in general, David A.J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986), chs. 4-5.

¹³⁰ Americans elaborate this principle beyond Locke, whose arguments focus on free exercise, not anti-establishment. For discussion of the ways Americans adapted and elaborated Locke's arguments, see Richards, *Toleration and the Constitution*, pp. 88-116.

ical authority was required in order to preserve the integrity of each, in particular, to preserve the moral independence of conscience against which the legitimate claims of state power could then be assessed.

In contrast, French revolutionary and constitutional thought identified traditional religion as an enemy to republican morality and asserted, following Rousseau, a role for the state as the religious pedagogue of republican morality. The policy of de-Christianization,¹³¹ including the Civil Constitution of the Clergy in 1790,¹³² thus set the course of the French republic in support of alternative political institutions of civil religion. The French disagreed among themselves about the appropriate forms of civil religion; Robespierre, for example, took violent objection to the festival of reason, but sponsored his own festival of Rousseauian republican religion.¹³³ Whereas Americans were skeptical about any political role in these matters, the French—consistent with the assumptions of their constitutionalism—undertook to define the *proper* political role, *i.e.*, the proper institution of civil religion that would be morally regenerative.

We should not, of course, underestimate the immensity of the task that the French revolutionary constitutionalists faced in contrast to the American sister republic, in particular, the lack of a secure republican consensus in France.¹³⁴ But the normative conception of popular sovereignty that framed their thinking led them to think ahistorically and uncritically about this task, adopting models of political power unconsciously in thrall to the absolutist institutions they thought they were repudiating. The institutions that republicans thought were morally regenerative (for example, de-Christianization) in fact imposed an unreasonable moral orthodoxy on many pious citizens, violated their right

¹³¹ See Mona Ozouf, "De-Christianization," in Furet, *Critical Dictionary*, pp. 20-32.

¹³² See Francois Furet, "Civil Constitution of the Clergy," in Furet, *Critical Dictionary*, pp. 449-57.

¹³³ See Mona Ozouf, "Revolutionary Religion," in Furet, *Critical Dictionary*, pp. 560-70.

¹³⁴ For a range of other contrasts, see Patrice Higonnet, *Sister Republics: The Origins of French and American Republicanism* (Cambridge, Mass.: Harvard University Press, 1988).

to conscience, rendered the republican consensus in France narrower and more unstable, and provoked both the opposition of the king and violent counter-revolution in several parts of the country.¹³⁵ In contrast, efforts at political reeducation like the public festivals¹³⁶ were idle rituals since they were not accompanied by the development of constitutional forms that would themselves engage the hearts and minds of the French people, and thus form an enduring republican consensus. The politically sectarian abuses of power by the republican leadership led them eventually to take the most disastrously self-destructive steps in frustrating the creation of a republican consensus that was among their central ambitions; in particular, they repeatedly failed to respect their own constitutional representative institutions whenever it was convenient to do so (including the use of the Parisian mob to secure political ends they were unable to secure through electoral politics). The politics of participation of the Parisian mobs thus flourished as actual voting by the people understandably declined.¹³⁷

That fact—mobs over voters—illuminates the tragic trajectory of French republicanism into Napoleonic dictatorship. Voting not only enables voters to register their personal preferences for public goods and services and corresponding tax burdens; it also allows the electorate to formulate, discuss, and express its deliberative views about how public policy should address issues both of justice and the common good. The resolution of political controversy in this way is fundamental to the conception of democratic civility among citizens of a free society, their capacity to resolve differences deliberatively in light of an informed and critically independent public opinion which (by virtue of guarantees of free speech) is not itself hostage to the state's authority and control. The substitution of the Parisian mobs (controlled by politicians) for voting undermined the conception of reasonable public justification fundamental to constitutional

¹³⁵ For a vivid narrative of these events, including the effects of de-Christianization in driving Louis XVI from any sympathy he may have had with the revolution, see, in general, Simon Schama, *Citizens: A Chronicle of the French Revolution*.

¹³⁶ For colorful description of these festivals, see, in general, Simon Schama, *Citizens: A Chronicle of the French Revolution*.

¹³⁷ See Patrice Gueniffey, "Elections", in Furet, *Critical Dictionary*, at p. 37.

government as such, making impossible the development of reasonable political discourse among pluralistic views all of whom are respected. In effect, the republican leadership manipulated the mobs to achieve its own ends, and thus eroded any possibility of a critical public opinion that could impose reasonable constitutional constraints on the exercise of political power. The consequence was a dynamic that narrowed the conception of what counted as reasonable and tolerable political disagreement (in effect, assimilating any opposition to treason), thus further eroding the breadth of support that republicanism must have if it is to be viable. Republicanism had appealed to the French in the terms of the Declaration of Rights of Man and Citizen, just as it had moved Americans in the form of a constitutionalism centered on Madison's piercing observation of the contradiction between mobs and the constitutional processes that protect human rights. Republicanism increasingly repelled the French, as it would have Americans, when it took the form of the inverted world of Robespierre's republicanism, in which the mob is the voice of human rights.

Even after the suppression of the mobs after Thermidor, the self-destructive pattern of republican leadership persisted. The 1795 constitution was in part designed to secure a more deliberative republican politics through a constitutional design of independent centers of power, a bicameral legislature and an executive elected by the legislature (the Directory).¹³⁸ There was, however, still no serious concern to innovate some impartial processes to secure that political bodies (like the Directory) adhere to the constitution; Sieyes's recommendation of a constitutional jury for this purpose was, for example, not accepted.¹³⁹ Even if Sieyes's recommendation had been heeded, it would have made little difference. If the republicans of 1795 had painfully learned skepticism about the political virtue of the people, it had not learned to be skeptical about its own virtue. The new constitutional forms were just that, forms, drained of any weight by a republican leadership that, secure in its own republican virtue over that of the people, flouted the results of elections when-

¹³⁸ See William Doyle, *The Oxford History of the French Revolution*, p. 319.

¹³⁹ See Keith M. Baker, "Sieyes", in Furet, *Critical Dictionary*, at p. 322.

ever it suited their political convenience. The Directory's repeated disrespect for electoral processes sowed the seeds for the public acceptability of the Napoleonic dictatorship.¹⁴⁰

It was a disastrous political education in republican values for leaders thus to substitute political convenience for constitutional forms; in effect, the normative theory of popular sovereignty (with its controlling weight on the republican virtue of either the leadership or of the people) legitimated clearly unconstitutional uses of political power that alienated many from the idea of republican government. The deepest damage of these developments was, of course, to respect for the inalienable human rights that French revolutionary constitutionalists had once explained to the French people as the very point of the entire republican project. The forms of French constitutionalism during this formative period did not and were publicly seen not to protect rights, for they did not exercise significant independent constraint for the protection of rights on the leadership's pursuit of its own convenience. Indeed, one such development, based on a grotesque appeal to Rousseauian popular sovereignty, unleashed the mobs of Paris with their murderous violations of anything that respect for human rights could mean or reasonably be taken to mean.

It is surely good evidence for the constitutional wisdom of the American skepticism about the self-deceiving corruptibilities of man's political nature that these events could have been sponsored by politicians in the name of Rousseau's elevated and humane vision of a political community alive with respect for human rights. The French nightmare of democratic reason was an American nightmare, invoked by Madison in some of his darkest and most prescient pages. It was the tragedy of the democratic constitutionalism of the late eighteenth century—shared by two intelligent and enlightened peoples—that one of them, moved by a vision of their own goodness, should have had to live out that nightmare to its final bitter and disillusioned end.

¹⁴⁰ See William Doyle, *The Oxford History of the French Revolution*, pp. 318-40.

IV. CONCLUSION

Constitutionalism requires the elaboration and vindication of a form of argument that has a weight understood to be reasonably supreme over ordinary democratic politics. Both American and French revolutionary constitutionalism apparently understood that fact, and regarded it as fundamental to the protection of the inalienable human rights that were, in principle, immune from political bargaining. During the period we have examined, American constitutionalism succeeded in developing structures adequate to sustain such distinctively constitutional arguments; French constitutionalism did not. This essay has emphasized two distinctions between American and French constitutionalism: views of man's political nature and skepticism or trust in redemption through political institutions. These differences fundamentally shaped the interpretations each people gave to their common moral ideal and the methodologies of thought and deliberation they regarded as appropriate.

These distinctions may very well be the consequence of a deeper feature of the thought of each people: the American emphasis on continuity with a valued tradition, the French on radical repudiation and a new beginning. The American acknowledgement of continuity did not make them less self-critical or searching or philosophical than the French. To the contrary, the assumption and interpretation of that continuity was what provoked Americans to the remarkable level of critical intelligence they thought they needed to explain what they regarded as of enduring value in their novel constitutionalism. In contrast, the French repudiation of their traditions may have made them hostage to them—so absorbed by models of simple and centralized authority, so fatally naive about the nature of political power under republican government. The very intoxication with ideas—that so powerfully prepared and fired the French revolutionary mind¹⁴¹—may have, in the absence of the kind of practical democratic experience that so leavened Madison's philosophical constitutionalism (his active service, for example, both in

¹⁴¹ See, in general, Francois Furet, *Interpreting the French Revolution* Elborg Forster trans. (Cambridge: Cambridge University Press, 1981).

the Virginia legislature and the Continental Congress),¹⁴² led them to ignore whatever experience or tradition might have taught them,¹⁴³ to be so blindly possessed and absorbed by a visionary politics of republican virtue that, if I am right, it devoured and destroyed them.

Republican constitutionalism is, as Madison insisted, "the greatest of all reflections on human nature".¹⁴⁴ American and French constitutionalism in the late eighteenth century were two remarkable reflections on this theme, the one skeptical and tolerant, the other visionary and sectarian. The French trust in the regeneration of republican virtue, as a central principle of their constitutionalism, led them to rely either on the virtue of their leaders or of the people, and, for this reason, they never achieved any reasonable conception of constitutional argument that all would regard as supreme over ordinary politics; indeed, their constitutionalism collapsed into manipulative political strategies that discredited the principles of republicanism among the people. American distrust of political power led them to a Madisonian distrust even of power ostensibly grounded in republican virtue (because power could corrupt and subvert even moral conscience, the basis of human rights), and to seek and achieve arguments of constitutional principle that could constrain such power in service of respect for human rights. The American and French models of revolutionary constitutionalism set the terms of achievement or of tragedy of the aspiration to democratic government that is today alive everywhere. These options remain about us today as all too stark and too real—the

¹⁴² See, for example, Adrienne Koch, *Jefferson and Madison: The Great Collaboration*, pp. 3-61; and, in general, Jack N. Rakove, *The Beginnings of National Politics*.

¹⁴³ Francois Furet put the point as follows: "Deprived of true liberty, Frenchmen turned to natural law; incapable of collective experience, unable to test the resistances of a political process, they unwittingly set their course toward a revolutionary utopia; without an aristocracy, without organized leadership, without the possibility of calling upon professional politicians, they turned toward men of letters. Literature took on the role of politics. This phenomenon was subsequently fostered and intensified by an internal dialectic, for the intellectuals were by nature, and not just by the force of circumstance alone, the social group most lacking in political experience. In destroying the aristocracy, the monarchy had turned writers into make-believe substitutes for a ruling class. France then went from a debate about how to run the country to the discussion of ultimate values, from politics to revolution", Furet, *Interpreting the French Revolution*, p. 157.

¹⁴⁴ *The Federalist*, p. 349.

opportunity to bring humane critical intelligence to bear on a politics of human rights, or its corruption and inversion of the language and thought of rights into moral intolerance and political sectarianism.

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COMMENTS

THE LIMITS OF THE MISSISSIPPI SUPREME COURT'S RULE-MAKING AUTHORITY

INTRODUCTION

In the landmark case of *Hall v. State*,¹ the Mississippi Supreme Court set new ground in the area of rule promulgating authority. No longer does the Mississippi Legislature have the express authority to pass statutes bearing on rules of evidence or court procedure. Instead, this authority lies exclusively with the Mississippi judiciary. *Hall* is the culmination of years of seething debate over whether the legislative branch of state government had the authority to promulgate rules governing the judicial branch. Indeed, in view of the *Hall* decision, the power struggle may not yet be over.

This comment will provide a brief legal overview of the controversy, examining the two sources of rule-making authority which inalterably led to the conflict in Mississippi. In addition, this comment will examine how other states have dealt with similar problems. Finally, this author will propose a solution as to how judiciary rules of practice and procedure should be promulgated in Mississippi.

I. A BRIEF HISTORY OF A CONSTITUTIONAL CONTROVERSY

Over the last two decades, a serious controversy has existed in Mississippi over what branch of the state government has the authority to promulgate rules of evidence and procedure.² According to early

¹ 539 So. 2d 1338 (Miss. 1989).

² Page, *Constitutionalism and Judicial Rule-making: Lessons from the Crisis in Mississippi*, 3 Miss. C.L. REV. 1, 4 (1982); see Franck, *Practice and Procedure in Missis-*

records, judicial procedures in Mississippi have been subject to legislative enactments,³ and statutes have governed circuit and chancery court procedure since 1857.⁴ A mere cursory analysis of Mississippi legislative history clearly shows that the legislature has exercised authority over the procedural rules of the Mississippi state courts.

The power exercised by the legislature over the judiciary did not receive much attention until recently, when many members of the bench and bar sought to modernize the rules of practice and procedure in Mississippi. In 1972, Lawrence J. Franck, a practitioner in the state, published an article arguing that the Mississippi Supreme Court should undertake to reform the state's procedural rules on the basis of the court's own rule-promulgating authority inherent in the Mississippi Constitution.⁵ The supreme court responded in 1975 with the decision of *Newell v. State*.⁶ In *Newell*, the court declared unconstitutional a state statute that prohibited a trial judge from instructing the jury except at the request of either party.⁷ In finding this statute unconstitu-

ssippi: An Ancient Recipe for Modern Reform, 43 Miss. L.J. 287, 288-94 (1972) (discussing history of practice and procedure rule-making power in Mississippi); Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 Miss. C.L. REV. 45, 47-48 (1982) (disagreeing with Professor Page's view that Mississippi Supreme Court should not be official promulgating body for rules of practice and procedure).

³ See The Circuit Court Act of 1822, Miss. CODE ch. 59, art. 1, § 49 (1848) (provision permitting defendants to raise several pleas). The Act also contained provisions requiring plaintiff in actions of indebitatus assumpsit, and defendants in pleas of payment and of set-off to file detailed accounts, *id.*, §§ 60-61; and provisions regulating amendments to pleadings before and after verdicts. *Id.* §§ 91-93, 99. Other significant amendments to common law practice were adopted in 1823, 1824, 1828, 1830, 1836, 1837, 1838, 1840, 1842, and 1846. See Miss. CODE, ch. 59, arts. 2-13 (1848).

⁴ Every codification of Mississippi statutes since 1857 has contained a procedural code for circuit and chancery courts. See Miss. CODE ANN. §§ 11-7-1 to -221 (1972) (Circuit), Miss. CODE ANN. §§ 11-5-1 to -167 (1972) (Chancery); Miss. CODE ANN. §§ 1394-1565 (1942) (Circuit); Miss. CODE ANN. §§ 1215-1393 (1942) (Chancery); Miss. CODE ANN. §§ 473-621 (1930) (Circuit), Miss. CODE ANN. §§ 318-472 (1930) (Chancery); Miss. CODE ANN. §§ 438-631 (1927) (Circuit); Miss. CODE ANN. §§ 243-432 (1927) (Chancery); Miss. CODE §§ 426-616 (1917) (Circuit); Miss. CODE §§ 238-420 (1917) (Chancery); Miss. CODE ch. 20 (1906) (Circuit), Miss. CODE ch. 19 (1906) (Chancery); Miss. CODE ch. 21 (1892) (Circuit); Miss. CODE ch. 20 (1892) (Chancery); Miss. CODE ch. 58 (1880) (Circuit); Miss. CODE ch. 59 (1880) (Chancery).

⁵ See Franck, *supra* note 2.

⁶ 308 So. 2d 71 (Miss. 1975).

⁷ *Newell*, 308 So. 2d at 74. The statute was codified as Miss. CODE ANN. § 11-7-155 (1972) for civil causes and Miss. CODE ANN. § 99-17-35 (1972) for criminal causes. The statutes explicitly provide that "[t]he judge . . . shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case." Miss. CODE ANN. §§ 11-7-155, 99-17-35 (1972).

tional, the court explained that the judiciary had the "inherent power . . . to promulgate procedural rules [which] emanate from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."⁸ However, the court recognized the right of the legislature to pass procedural statutes and stated that such statutes would be followed "unless determined to be an impediment to justice or an impingement upon the [Mississippi] Constitution."⁹

The Mississippi Supreme Court's declaration in *Newell* that "inherent power" to promulgate procedural rules existed in the judicial branch was by no means a novel idea. In *Southern Pacific Lumber Co. v. Reynolds*,¹⁰ the court had earlier espoused that "[t]he phrase 'judicial power' in section 144 of the [Mississippi] Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business."¹¹ However, the *Newell* decision was particularly unique because its dicta foreshadowed the court's taking a stronger position in promulgating its own rules of procedure. Although the court gave credence to the legislature's authority to create procedural statutes, the court also postulated that

[t]he procedural changes needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose would be better served . . . if promulgated by those conversant with the law through years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and

⁸ *Newell*, 308 So. 2d at 76. One author described the *Newell* decision as creating an "embryo" doctrine for Mississippi. Kay, *The Rule-making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 33 (1975). In *Newell*, the court had developed the potential to claim exclusive rule-making power even though the state constitution did not afford the court such power. *Id.* at 32-33. If the Mississippi Supreme Court were to pursue such a course of action, it and the Connecticut Supreme Court would be the only courts to have challenged their respective state constitutions in such a manner. *Id.* at 33.

⁹ *Newell*, 308 So. 2d at 76.

¹⁰ 206 So. 2d 334 (Miss. 1968).

¹¹ *Reynolds*, 206 So. 2d at 335. Section 144 of the Mississippi Constitution does not explicitly grant to the court the authority to create rules. Section 144 reads: "Section 144. The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution." MISS. CONST. art. VI, § 144. Nevertheless, the court found that its inherent authority emanated from this provision. *Reynolds*, 206 So. 2d at 335.

professions.¹²

Whether the court believed the legislature should have rule-making authority or not, the court stated that "as long as rules of judicial procedure enacted by the legislature coincide[d] with fair and efficient administration of justice, the [c]ourt w[ould] consider them in a cooperative spirit to further the state's best interest"¹³ In sum, the court in *Newell* concluded that procedural statutes were valid and would be utilized by the court unless such statutes were unconstitutional or impeded the "fair and efficient administration of justice," a duty which, as a practical matter, belonged to the court.¹⁴

After the *Newell* decision, the legislature began to react to the apparent need for procedural reform. In 1975, the same year that *Newell* was decided, the state legislature enacted a series of statutes establishing the rules of discovery.¹⁵ In addition, the legislature passed a statute vesting the general rule-making power in the supreme court.¹⁶ Although the legislature granted the supreme court a statutory rule-making power, it did not relinquish all such power to the court. Instead, the legislature attempted to create concurrent authority between the judiciary and the legislature for promulgating judiciary rules of procedure. Under the 1975 statutory framework, an advisory committee consisting of judges and practicing attorneys would be established to develop a proposed set of Rules of Civil Procedure.¹⁷ The supreme court was given the preeminent authority in studying and drafting these

¹² *Newell*, 308 So. 2d at 76.

¹³ *Id.* at 78.

¹⁴ *Id.*

¹⁵ 1975 Miss. Laws 501, 1-14 (codified at Miss. CODE ANN. § 13-1-226 to -243 (Supp. 1989)). These rules were based on the federal discovery rules. Page, *supra* note 2, at 5.

¹⁶ 1975 Miss. Laws 501, 15-19 (codified at Miss. CODE ANN. § 9-3-61 to -69 (Supp. 1989)).

¹⁷ Miss. CODE ANN. §§ 9-3-65, -69 (Supp. 1989). According to the statutes, the Advisory Committee is to be composed of:

(a) a justice of the supreme court, elected by the supreme court judges; (b) three (3) circuit judges, one (1) from each supreme court district, elected by the circuit judges of the entire state; (c) three (3) chancery court judges, one (1) from each supreme court district, elected by the chancellors of the entire state; (d) two (2) county court judges, elected by the county court judges; (e) three (3) resident practicing attorneys representing the various interests of the trial bar, selected by the commissioners of the Mississippi State Bar Association; and (f) two (2) other resident practicing attorneys of at least five (5) years' [sic] experience, selected by the supreme court."

Miss. CODE ANN. § 9-3-65 (Supp. 1989).

rules,¹⁸ but the final rules developed by the advisory committee were subject to veto by the judiciary committees of the state legislature.¹⁹

In 1979, the court submitted, on the behalf of the advisory committee, the proposed Rules of Civil Procedure.²⁰ Although the House Judiciary Committee rejected the rules in their original form, it met with certain segments of the bar to discuss revisions.²¹ Out of these meetings, the House Judiciary Committee drafted a revised version of the Rules which was subsequently submitted to the Senate Judiciary Committee. The Senate Committee rejected the revised version of the Rules and "no further funds were appropriated to support the advisory committee."²²

The proposed Rules of Civil Procedure were not to be discarded, however. Creating a "direct confrontation" between the legislature and the court,²³ the Mississippi Supreme Court ordered that the rules be adopted on May 26, 1981.²⁴ Both houses of the legislature concurrently requested that the court rescind its order, and the court promptly refused.²⁵ The proposed rules then became effective on January 1, 1982.²⁶ Although "[n]o other Court in the United States ha[d] ever adopted a blanket set of rules in the absence of explicit statutory or constitutional authority before," the Mississippi Supreme Court has seen fit to do so.²⁷

It appeared that the battle lines had then been drawn between the legislature and the Mississippi Supreme Court. The legislature's next step was to attempt to confine the court's rule-making authority by amending section 146 of the Mississippi Constitution in 1983. As amended, section 146 narrowed the authority of the supreme court to

¹⁸ MISS. CODE ANN. § 9-3-69 (Supp. 1989). The supreme court retained preeminence in rule-making as a result of section 9-3-69 which provided that "a final draft of the proposed Rules of Civil Practice and Procedure [be submitted] to the supreme court, which may amend, revise, delete or add to the recommended rules as it concludes will best serve the administration of justice." *Id.*

¹⁹ See MISS. CODE ANN. § 9-3-71 (Supp. 1989).

²⁰ Page, *supra* note 2, at 5.

²¹ *Id.* at 6.

²² *Id.*

²³ Page, *supra* note 2, at 6.

²⁴ Order of May 26, 1981, 395-97 So. 2d Miss. Cases 1 (1981); see also *Hall v. State*, 539 So. 2d 1338, 1358 (Miss. 1989) (Hawkins, J., dissenting) (discussing supreme court's adopting of proposed Rules of Civil Procedure). The court deleted Rules 4 and 14 but the other Rules were kept intact. *Hall*, 539 So. 2d at 1358.

²⁵ Page, *supra* note 2, at 6-7.

²⁶ *Id.*

²⁷ *Hall*, 539 So. 2d at 1358.

appellate jurisdiction only, stating that it was to "exercise no jurisdiction on matters other than those specifically provided by th[e] Constitution or by general law."²⁸ This amendment was "clearly aimed at preventing future encroachments by th[e] Court into an area the Legislature considered its own."²⁹ Nevertheless, the court on September 24, 1985, published the Mississippi Rules of Evidence and ordered such rules to be the evidentiary rules applied in the courts of Mississippi.³⁰ The legislature sat idly by and took no action, thereby avoiding "a constitutional crisis."³¹ The evidentiary rules went into effect on January 1, 1986.

The latest development in the continuing conflict was the decision of *Hall v. State*,³² in which the court took a further step in asserting its inherent rule-making authority. At issue in *Hall* was a legislative statute which provided for the admissibility of hearsay evidence in child abuse cases.³³ In *Hall*, the testimony of two social workers was admitted to establish what had allegedly happened to the victim.³⁴ The bases of the testimonies were statements made by the victim to the social workers.³⁵ Although the defendant raised objections on constitutional grounds,³⁶ the court evaluated the statute by another rubric. The majority began its pertinent discussion by stating that "[w]hen Rule 802 [of the Mississippi Rules of Evidence] declares that hearsay is not ad-

²⁸ Miss. CONST. art. VI § 146 (1890, amended, 1983). This provision limiting the Mississippi Supreme Court's jurisdiction to that provided by "general law" should be read in conjunction with Miss. CONST. art. IV, § 90(s) which grants the legislature the authority to provide "by general law" the rules "regulating the practice in courts of justice." Miss. CONST. art. IV, § 90(s).

²⁹ *Hall*, 539 So. 2d at 1358.

³⁰ See Order of September 24, 1985, 474-77 So. 2d Miss. Cases 27 (Miss. 1985).

³¹ *Hall*, 539 So. 2d at 1358.

³² *Id.* at 1338.

³³ *Id.* at 1340. The statute referred to as the Evidence of Child Sexual Abuse Act was codified as Miss. CODE ANN. §§ 13-1-401-415 (Supp. 1990). The statute provides that a victim of child abuse may testify to a third party concerning the alleged act of child abuse, and the third party may testify in court as to the content of the child's testimony. *Id.* §§ 13-1-401, -41. The policy behind this rule is that a child, required to testify in open court about sexual abuses committed against him, would "experience traumatic or emotional distress." *Hall*, 539 So. 2d at 1340; see Miss. CODE ANN. § 13-1-403 (Supp. 1990) (admissibility of child's out-of-court statements defined).

³⁴ *Hall*, 539 So. 2d at 1341.

³⁵ *Id.*

³⁶ *Id.* at 1341 n.4. The defendant argued that the statute violated the defendant's right to confront his adverse witnesses, pursuant to article 3, section 26 of the Mississippi Constitution of 1890 and the sixth and fourteenth amendments to the Constitution of the United States. *Id.*

missible 'except as provided by law,' it means 'except as provided by *valid* law . . .' [and] [l]aw is valid only when it emanates from a source having authority to make it."³⁷ Standing on the inherent power which it had defined in *Newell*, the court went a step further and defined the legislature's rule-making power. Delineating the powers of the judiciary and the legislature in the context of the separation of powers doctrine, the court reasoned that: "[a]t its heart [the] doctrine of separation of powers provides that no officer of one department of government may exercise a power at the core of the power constitutionally committed to one of the other departments."³⁸ The court went on to explain that its "order implementing [the Mississippi Rules of Evidence] [was] the ultimate authoritative *legislation* that the making of rules of evidence, and particularly rules regulating the use of hearsay evidence, lies on judicial turf."³⁹ The majority concluded by defining the rule-making authority of the legislature:

As trials are the core activity of the judiciary, so the promulgation of rules for the *regulation of trials* lie at the core of the judicial power. That being so, it only follows that the officers of neither the legislature nor executive departments of government, acting jointly or severally, [have] authority to confer legal validity upon the Evidence of Child Sexual Abuse Act.⁴⁰

³⁷ *Id.* at 1344 [emphasis added].

³⁸ *Id.* at 1345 (citing *Alexander v. State*, 441 So. 2d 1329, 1345-46 (Miss. 1983)). The court premised its separation of powers analysis on the idea that the Mississippi Constitution "command[s] that the three great governmental powers be separate." *Id.* (citing Miss. CONST. art. I, § 1 and 2 (1980)). According to the court, "[t]he powers vested in th[e] [c]ourt have been broadly declared" in the Mississippi Constitution. *Id.* Specifically, the court noted section 144, which provides that "the judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution." Miss. CONST. art. 6, § 144 (1890). Into this constitutional provision the court read its power to make rules of practice, procedure and evidence. *Hall*, 539 So. 2d at 1345. The power of judicial review also finds its grounds in this provision. *Id.*; see also *Alexander v. State*, 441 So. 2d 1329, 1329 (Miss. 1983) (discussing limits of supreme court power).

³⁹ *Hall*, 539 So. 2d at 1346 (emphasis added). One must conclude from the court's use of the term "legislation" that the supreme court has the inherent authority not merely to adjudicate upon statutory law and establish common law but also to legislate rules of evidence.

⁴⁰ *Id.* (emphasis added). Justice Hawkins dissented from the majority. *Id.* at 1349-66 (Hawkins, J., dissenting). Justice Hawkins' dissent is not discussed at length in this comment but contains an historical and a constitutional analysis of the rule-making problems in Mississippi and is exceedingly helpful in understanding the possible constitutional fallacies of the *Hall* decision. Furthermore, it is interesting to note that the majority chose to use the words "regulation of trials" in light of the vernacular of section

Thus, according to *Hall*, the state legislature has no authority to promulgate rules of evidence.

Although the majority did not clearly provide a broad holding concerning the legislature's rule-making authority, Justice Hawkins in his lengthy and poignant dissent clarified the decision of *Hall* as "holding . . . [is] that the Legislature has no constitutional authority to pass laws dealing with evidence or procedure."⁴¹ Footnote twenty to the majority's opinion further revealed a philosophical side to the court's rationale, expressing that this particular holding

is not to say that the judiciary should give the back of its hand to every legislative enactment arguably encroaching upon its rule-making turf. . . . [D]eference ought to be given such legislative expressions, *not out of obligation but comity, not out of accession to authority*, but in respect for the legislature as that branch of government closest to the people whom all branches have been created to serve.⁴²

The majority declared that statutory provisions providing the procedure for examining a judgment debtor had validity "not because [the statute] ha[d] been enacted by the legislature but because [the supreme court] ha[d] declared . . . that a judgment creditor may proceed 'as provided by statute.'"⁴³ Applying this line of reasoning across the board, it is safe to conclude that a procedural or evidentiary rule is valid only when the court says it is and can never obtain validity by virtue of being duly passed by the legislators of the State of Mississippi. Using the language of the court in *Hall*, any authority employed by the legislature to create rules of evidence and procedure is purely "legislative fiat."⁴⁴

II. TWO SOURCES OF THE RULE-MAKING AUTHORITY

The import of the *Hall* decision is that the legislature now has no authority to pass statutes bearing on evidence or procedure. The second portion of this comment provides an analysis of where such authority may be grounded. Generally, two sources creating rule-making

90(s) of the Mississippi Constitution, which specifically grants the legislature the authority to "regulat[e] the practice in courts of justice." See MISS. CONST. art. IV, § 90(s) (regulation of practice in courts of justice provided for only by general laws).

⁴¹ *Hall*, 539 So. 2d at 1350.

⁴² *Id.* at 1346 n.20.

⁴³ *Id.* at 1347 n.20.

⁴⁴ *Id.*

authority will be discussed: the Mississippi Constitution and inherent power which ostensibly lies in a particular branch of the government.

A. *The Mississippi Constitution*

A significant portion of the court's analysis in *Hall* was premised on the separation of powers between the judicial and the legislative branches of the government.⁴⁶ The separation of powers doctrine has been described as a philosophy which "rests on a theory of balance of power."⁴⁶ The primary impetus for the doctrine was to decentralize governmental power to avoid tyranny.⁴⁷ The framers of the United States Constitution utilized this doctrine, embracing Montesquieu's theory that a government could operate efficiently only if it were made flexible by the blending of power.⁴⁸ One scholar noted that because of the fact that powers are blended between the branches, "the term 'separation of powers' is misleading. . . . A dispersal of decisional responsibility in the exercise of each power, as distinguished from a separation of powers, is a more accurate analytical portrayal."⁴⁹ In the doctrine of separation of powers, "[n]o one branch holds ultimate unfettered decisional responsibility over the exercise of any governmental power."⁵⁰ The truth of this analysis has caused "political science . . .

⁴⁶ See *supra* note 38 and accompanying text.

⁴⁶ Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257, 258 (1985).

⁴⁷ *Id.*

⁴⁸ Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 396 (1935); see also Goldberg, *The Supreme Court, Congress, and Rules of Evidence* 5 SETON HALL L. REV. 667, 671 (1974) (stating that founding fathers heeded admonition of Montesquieu).

⁴⁹ Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 436 (1974).

⁵⁰ *Id.* Justice Joseph Story explained the separation of powers in this way:

[w]hen we speak of a separation of the three great departments of government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct and have no common link of connection or dependence *The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments.*

Levin & Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 36 n.178 (1958) (emphasis added) (quoting 1 J. STORY, CONSTITUTION 393 (5th ed. 1891)). Justice Story's definition would seem to lead to an entirely different conclusion than that reached by the Mississippi Supreme Court. In *Hall*, the court used the separation of powers to justify its exertion of exclusive control over the rules, whereas Justice Story described clearly that the doctrine limits the exer-

[to abandon] the theory of complete and exclusive authority over precisely delineated spheres of activity."⁵¹ In light of the separation of powers doctrine, the Mississippi Supreme Court's holding in *Newell* may surely be justified. In *Newell*, the court recognized the legislature's authority to legislate in the realm of procedure but established that it could also create rules.⁵² However, the court in *Hall* was not consistent with a sophisticated application of the separation of powers doctrine. In *Hall*, the court found the rule-making authority exclusively in the judiciary, closing the door to the authority of the legislature.⁵³

Although it is recognized by the author that federal law is not controlling when evaluating a state court's rule-making authority, federal law may nevertheless shed some light on the best constitutional and statutory scheme for promulgating rules. With that in mind, consider now the federal scheme for the adoption of rules. The federal courts generally base their power to make rules on enabling legislation. Chief Justice Marshall stated that the power of the United States courts to make rules was a proper grant of authority to the courts by Congress.⁵⁴ Although the Court has the authority to make rules, Congress also plays an integral role through the Federal Rules Enabling Act of 1934.⁵⁵ Under the Rules Enabling Act, the Court is granted authority over the rules and given authority to appoint a committee of experts to study, revise, and draft rules.⁵⁶ The Court may adopt the rules, but effectiveness of the rules is subject to congressional veto.⁵⁷

The Mississippi Legislature has provided a scheme almost identical to that utilized by the federal government.⁵⁸ However, according to

cise of "whole power" by one department. Levin & Amsterdam, *supra* at 36 n.178 (quoting 1 J. STORY, CONSTITUTION § 393 (5th ed. 1891)).

⁵¹ Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 629 (1957).

⁵² See *supra* notes 8-14 and accompanying text.

⁵³ See *supra* notes 40-44 and accompanying text.

⁵⁴ *Waymar v. Southard*, 23 U.S. 10 Wheat, 1, 1 (1825).

⁵⁵ 28 U.S.C. § 2072 (1976); see Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387-435 (1935) (discussing interplay between Congress and court in adopting rules); Sunderland, *The Grant of Rule-making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1116-1129 (1934) (same).

⁵⁶ See 28 U.S.C. § 2072 (1976) (provisions empowering Supreme Court to make rules).

⁵⁷ *Id.*

⁵⁸ See MISS. CODE ANN. §§ 9-3-61 to -73 (Supp. 1990) (the codified Mississippi Rules Enabling Act). See generally *supra* notes 16-19 and accompanying text describing the development of the statutory scheme.

Hall, the legislature has no valid authority to exercise over procedural rules. By implication, it must be assumed that section 9-3-71 of the Mississippi Code which gives the legislature veto power over the rules is null and void.⁵⁹

Inherent in any separation of powers analysis is consideration of the explicit language in the pertinent constitution. Considering the Mississippi Constitution, it is most relevant to decipher the provisions which limit the authorities of the legislative and judicial branches.⁶⁰ The authority of the judicial branch is delegated in article six. The most relevant sections are 144 and 146, which provide:

Section 144. The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

Section 146. The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and *shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law.*⁶¹

The legislative branch is limited in its powers by article four. The relevant sections for a discussion of its rule-making authority are sections 33 and 90(s), which provide:

Section 33. The legislative power of this state shall be vested in

⁵⁹ Section 9-3-71 of the Mississippi Code provides that supreme court "rules disapproved shall be suspended and of no effect." MISS. CODE ANN. § 9-3-71(1) (Supp. 1990). Furthermore, the legislature maintained that "any rule hereafter proposed or promulgated by the supreme court which has not been submitted to the legislature and become effective . . . shall be of no force and effect." MISS. CODE ANN. § 9-3-71(3) (Supp. 1990).

⁶⁰ The general constitutional provisions that may bear some relevance to this discussion are the following:

Article I. Distribution of Powers.

Section 1. The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Section 2. No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

MISS. CONST. art. I, §§ 1 and 2.

⁶¹ MISS. CONST. art. VI, §§ 144 and 146 (emphasis added). It should be noted that the *constitutional amendment* to section 146 was provided with its clearly limiting language after the court had assumed an inherent rule-making authority in adopting the rules of procedure *in toto*. See *supra* notes 28-29 and accompanying text.

a legislature which shall consist of a senate and a house of representatives.

Section 90. The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters *shall be provided for only by general laws*, viz.:

(s) Regulating the practice in courts of justice.⁶²

These provisions provide the framework within which any separation of powers discussion must be limited. To any conscientious reader, section 90(s) would seem to grant the legislature some authority to promulgate rules of evidence and procedure in the courts. It seems apparent from the constitution that not only does the legislature have the authority to create rules for the court, but it has a constitutional mandate to "regulat[e] the practice in courts of justice."⁶³

B. Inherent Power

As stated earlier, the inherent powers exercised by the court in *Newell* were not a new invention. In fact, many courts have exercised an inherent authority to promulgate rules of evidence and procedure.⁶⁴ Although many courts assert inherent power to promulgate rules of practice, an overwhelming majority of the same and other courts have recognized the validity of enabling legislation, holding that it consti-

⁶² MISS. CONST. art. IV, §§ 33 and 90(s) (emphasis added).

⁶³ MISS. CONST. art. IV, § 90(s).

⁶⁴ See *Burney v. Lee*, 59 Ariz. 360, 129 P.2d 308, 308-09 (1942) ("It has been held almost unanimously from time immemorial that courts have inherent power to prescribe rules of practice and rules to regulate their own proceedings in order to facilitate termination of justice, without any express permission from the legislative branch"); *Kolkman v. People*, 89 Colo. 8, 300 P. 575, 584 (1931) ("...[T]he question with which we are concerned is the right, irrespective of the statutes and the common law, but in conformity with constitutional provisions, to make rules with reference to procedural matters for the conduct of trials This is inherent in judicial department."); *Gyure v. Sloan Valve Co.*, 367 Ill. 489, 11 N.E.2d 963, 965 (1937) ("This court has not only the inherent power to prescribe rules of practice and procedure, but the power is expressly conferred by the statute"); *Epstein v. State*, 190 Ind. 693, 128 N.E. 353, 353 (1920) ("This court is a constitutional court, and as such receives its essential and inherent powers, rights and jurisdiction from the Constitution, and not from the Legislature, and it has power to prescribe rules for its own direct government, independent of legislative enactment"); *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 660 (1936) ("We therefore hold that trial court rules . . . were promulgated . . . by this court in the exercise of an inherent power lodged in us to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice"). See generally Annotations, *Power of Court to Prescribe Rules of Pleading, Practice, or Procedure*, 110 A.L.R. 22 (1937); 158 A.L.R. 705 (1945) (collection of cases from 42 states).

tutes a valid source of rule-making power.⁶⁵

The Supreme Court of the United States has cautioned that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."⁶⁶ Prior to *Hall*, the Mississippi Supreme Court abided by this directive,⁶⁷ but with the *Hall* decision, the court now appears to exercise an arbitrary and whimsical use of its inherent power. In addition, the *Hall* majority purported to strengthen the court's inherent power to promulgate rules of evidence and procedure by creating an inherent power in the court to patently exclude all statutory procedural enactments—despite a clear constitutional provision granting the legislature such power. Although the court may find an inherent power to "regulate the practice in the courts," this authority cannot legitimately be used to eradicate an explicit constitutional provision granting the same power to the legislature.⁶⁸

It seems only logical that a court has the power to create rules providing for the fair and efficient administration of its duty, i.e., the administration of justice.⁶⁹ For example, the court must make rules facilitating its own existence.⁷⁰ Similarly, the establishment of requirements for admissions to the bar is almost universally recognized

⁶⁵ For a collection of cases from 33 states, see Annotations, *supra* note 64.

⁶⁶ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

⁶⁷ See, e.g., *Hosford v. State*, 525 So. 2d 789, 798 (Miss. 1988) (court may pass rules to preserve its own integrity); *Mississippi Power Co. v. Goudy*, 459 So. 2d 257, 263 (Miss. 1984) (unconstitutionality of legislative statute must appear beyond reasonable doubt); *Brown v. City of Water Valley*, 319 So. 2d 649, 650-51 (Miss. 1975) (court may promulgate rules to insure efficient disposition of its case load); *Russell v. State*, 312 So. 2d 422, 423 (Miss. 1975) (court may create rule for convenient dispatch of business); *Scott v. State*, 310 So. 2d 703, 706 (Miss. 1975) (legislative procedural statute effective if not an unconstitutional invasion of defendant's rights); *Mississippi Pub. Serv. Comm'n v. Alabama Great S. R.R. Co.*, 294 So. 2d 173, 176 (Miss. 1974) (legislature has authority subject to constitution to prescribe regulations); *Matthews v. State*, 288 So. 2d 714, 715 (Miss. 1974) (legislative suggestions concerning procedural rules will be followed unless unreasonable or impracticable); *Brunt v. Watkins*, 101 So. 2d 852, 854 (Miss. 1958) (apart from question of due process, legislature has power to establish rules of evidence and procedure in civil proceedings).

⁶⁸ See Miss. CONST. art. IV, § 90(s) (granting legislature authority to regulate practice in courts).

⁶⁹ See Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 636 (1935) (explaining that court has power to promote its own existence, dignity, and functions); Joiner and Miller, *supra* note 51, at 626 (stating that court has inherent right to function and function efficiently); Kay, *supra* note 8, at 21 (same); Levin & Amsterdam, *supra* note 50, at 30 (stating that court has power to make its power effective in administration of justice); Silver, *supra* note 46, at 265 (same).

⁷⁰ Dowling, *supra* note 69, at 636.

throughout the United States as an inherent authority of the court.⁷¹ Although the inherent rule-making power of the court has long been recognized, the Mississippi Supreme Court has strayed from the legitimate use of that power. Previously, the court exercised its power in order to fulfill the court's constitutional mandate to fairly administer justice.⁷² The power to promulgate rules was enjoyed concurrently by the legislature and the judiciary, and this joint authority was readily recognized by the court.⁷³ However, the definition of "inherent power" that the court has effectively given in *Hall* is "an authority asserted over and above, and independent of, the constitution . . . [and] . . . [such] a claim is unwarranted."⁷⁴

One last consideration in determining the scope of the court's inherent power should be whether certain rules or procedures affect the substantive rights of the citizens of Mississippi. If the court promulgates rules which are substantive in nature, it has trespassed on an authority explicitly granted to the legislative branch.⁷⁵ The Mississippi courts are forbidden to promulgate substantive law, since that is the exclusive province of the legislature.⁷⁶ The distinction between substance and procedure is readily definable; procedural laws govern court activity, while substantive laws establish rights, set duties, and grant relief.⁷⁷ This distinction is extremely difficult to apply, as substantive rights are often inextricably interwoven with procedural regulations.⁷⁸ In the absence of constitutional guidance, the distinction between substance and procedure falls to judicial decision.⁷⁹ Regardless of the difficulty in determining whether a rule bears on substantive rights, an un-

⁷¹ For a collection of cases, see Green, *The Court's Power Over Admission and Disbarment*, 4 TEX. L. REV. 1, 12 n.35 (1925).

⁷² See, e.g., *Newell v. State*, 308 So. 2d 71, 77 (Miss. 1975); *Matthews v. State*, 288 So. 2d 714, 715 (Miss. 1974).

⁷³ See, e.g., *Newell*, 308 So. 2d at 77; *Mississippi Pub. Serv. Comm'n v. Alabama Great S. R.R. Co.*, 294 So. 2d 173, 176 (Miss. 1974); *Brunt v. Watkins*, 101 So. 2d 852, 854 (Miss. 1958).

⁷⁴ Dowling, *supra* note 69, at 636.

⁷⁵ See MISS. CODE ANN. § 9-3-63 (Supp. 1989) (court shall not abridge, enlarge or modify any substantive right).

⁷⁶ See *supra* note 74 and accompanying text.

⁷⁷ See Note, *The Rule-making Powers of the Illinois Supreme Court*, 1965 U. ILL. L. J. 903, 904 (discussing general rule that laws which fix duties and establish rights and responsibilities among and for persons are substantive in character, while those which merely prescribe manner in which such rights and responsibilities may be exercised and enforced in court are procedural).

⁷⁸ See, e.g., *Dead Man's Statute*, MISS. CODE ANN. § 13-1-7 (1972) (rules of evidence and procedure substantially affect claimant's rights).

⁷⁹ Note, *supra* note 77, at 914.

abridged right to create substantive rights must be vested in the legislature.⁸⁰ The legislature must have the power to enforce the public policy it was elected to establish. Surely, this is an inherent power of the legislature.

III. OTHER STATES' PROVISIONS FOR RULE-MAKING AUTHORITY

There has been a definite trend in the twentieth century toward vesting the judiciary with authority over the rules of practice and procedure.⁸¹ Although courts have always exercised some control over court rules, today "primary or exclusive control over rules of practice and procedure by the judiciary is not at all unusual in American jurisdictions."⁸² Roscoe Pound discussed the genesis of the movement toward granting courts rule-making authority superior to that of the legislature in an address before the Conference of Bar Associated Delegates at the 1926 American Bar Association annual meeting.⁸³ In

⁸⁰ See Goldberg, *supra* note 48, at 677 (explaining that unless rules regulate only practice and procedure and do not abridge, enlarge or modify any substantive right, they would be beyond limits of power of court); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-making: An Appraisal of Winberry v. Solisberry*, 65 HARV. L. REV. 234, 239 (1951) (stating that phrase "subject to law" serves as reminder that court's rule-making power must not invade field of substantive law); Page, *supra* note 2, at 40-43 (same).

⁸¹ See generally Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32 (1936) (discussing issue of court rule-making authority); Joiner & Miller, *supra* note 51, at 624-27 (same); Kaplan & Greene, *supra* note 80, at 241-54 (same); Levin & Amsterdam, *supra* note 50, at 1-42 (same); Wheaton, *Courts and the Rule-making Powers*, 1 MO. L. REV. 261 (1936) (same); Note, *Legislature and Supreme Court Clash on Rule-making Powers in Colorado*, 27 ILL. L. REV. 664-70 (1933) (same).

⁸² Kay, *supra* note 8, at 27 (noting shift of rule-making authority from legislatures to judiciaries after explicit legislative delegation).

⁸³ See Pound, *The Rule Making Power of the Courts*, 12 A.B.A. J. 599 (1926). Although an inherent rule-making power had been recognized by most courts before 1926, such power was not generally thought to be exclusively in the province of the judiciary. See, e.g., *Stafford v. State*, 154 Ala. 71, 45 So. 673, 673 (1908) (court has authority to adopt rule which in no way contravenes statutory law); *Pieper v. Centinela Land Co.*, 56 Cal. 173, 174 (1880) (court may promulgate rule in absence of statute); *Ernst v. Lamb*, 73 Colo. 132, 213 P. 994, 994 (1923) (recognizing inherent rule-making power in court but recognizing legislature's concurrent power); *State ex rel. Ross v. Call*, 39 Fla. 504, 22 So. 748, 749 (1897) (same); *Brown v. Hutcheson*, 167 Ga. 451, 146 S.E. 27, 27 (1928) (stating court has had inherent power to make rules from its inception but power subject to statute); *Hayward v. Ramsey*, 74 Ill. 372, 375 (1874) (stating that judge is absolutely powerless to repeal or abrogate any provision of statutes by rule of court); *Laselle v. Wells*, 17 Ind. 33, 34 (1861) (recognizing court's inherent rule-making authority is subordinated to legislative statute); *Wilson v. Iowa County*, 52 Iowa 339, 1 N.W. 490, 491 (1879) (same); *Petty v. Wilbur Stock Food Co.*, 128 Ky. 130, 107 S.W. 699, 701 (1908)

his address, Pound asserted that the courts were the proper entities to promulgate rules of practice and procedure and advocated judicial supremacy over procedural matters.⁸⁴ Pound's proposition gained the support of the American Bar Association and an expansive reform movement filtered through many American jurisdictions to transfer rule-making authority to the courts.⁸⁵

In most American jurisdictions, the judiciary is granted authority

(same); Walker v. Ducros, 18 La. Ann. 703, 704 (1866) (same); Holton v. American Pastry Products Corp., 274 Mass. 268, 174 N.E. 663, 664 (1931) (same); Youngs v. Peters, 118 Mich. 45, 76 N.W. 138, 138 (1898) (same); Pickett v. Pickett, 1 How. 267 (Miss. 1836) (same); Pelz v. Bollinger, 180 Mo. 252, 79 S.W. 146, 148 (1904) (court's inherent rule-making power does not warrant imposition of burdens additional to those imposed by law); Ten Eyck v. Farlee, 16 N.J.L. 348, 348 (1838) (court's inherent rule-making power does not supersede statute); Rice v. Ehele, 55 N.Y. 518, 524 (1874) (court imposed rules must be consistent with statutory law); Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433, 434 (1910) (same); Kelly v. Pennsylvania Co., 253 Pa. 553, 98 A. 767, 768 (1916) (same); World Granite Co. v. Morris Bros., 142 Tenn. 665, 222 S.W. 527, 528 (1919) (same); Craver v. Greer, 107 Tex. 356, 179 S.W. 862, 862 (1915) (same); Colle v. Kewaunee, G.B. & W.R. Co., 149 Wis. 96, 135 N.W. 536, 540 (1912) (same).

⁸⁴ Pound, *supra* note 83, at 599-603. Pound became very active in the procedural reform movement that was taking place in many American jurisdictions during the early twentieth century and was one of the premier proponents of reform being accomplished by judicial supremacy over rules. See, e.g., Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J 12 (1927) (Supp. to March issue) (asserting that courts have inherent power to make rules); Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541 (1923) (stating that legislatures are too cumbersome and rigid to react to necessary procedure reforms); Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L.Rev. 163 (1915) (same). Also joining in the crusade toward exclusive control of rules by the judiciary was Dean Wigmore. See Wigmore, *All Legislative Rules of Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (asserting that legislature exceeds its constitutional power when it attempts to impose any rules for dispatch of judiciary's duties).

Wigmore's pronouncement that legislatures have no authority to enact statutes bearing on procedure has been characterized as "the jeu d'esprit of a master" and not "a serious constitutional analysis." Kaplan & Greene, *supra* note 80, at 251. Many commentators have discussed the illegitimacy of courts asserting exclusive authority over rules when such authority had not been granted the court by the legislature. See generally Goldberg, *supra* note 48, at 677 (stating that unless rules regulate only practice and procedure and do not change substantive rights they would be beyond limits of power delegated to court); Joiner & Miller, *supra* note 51, at 640 (explaining that legislative statutes should get full effect if court has not passed rule); Kaplan & Greene, *supra* note 80, at 252 (discussing lack of wisdom in excluding legislature from rule-making); Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L. Q. 459, 509 (1937) (discussing need for legislature's role in rule-making to meet needs of society and establish public policy).

⁸⁵ Kay, *supra* note 8, at 28.

to promulgate rules of practice and procedure by either statute⁸⁶ or constitutional grant.⁸⁷ Although some constitutions have merely granted a general rule-making power to the state supreme court,⁸⁸ most states either by statutory provision or by constitution have expressly limited the authority given courts to prescribe rules. The most common restriction on judicial rule-making authority imposed by state law

⁸⁶ See, e.g., ARK. STAT. ANN. § 16-11-301 (1987) (granting court rule-making power in criminal cases); ARK. STAT. ANN. § 16-11-302 (1987) (granting court rule-making power in civil cases); CONN. GEN. STAT. ANN. § 51-14(a) (West 1988) (granting court authority to adopt and promulgate rules); GA. CODE ANN. § 15-2-18 (1990) (same); IDAHO CODE § 1-212 (1990) (confirming court's inherent rule-making authority); ILL. ANN. STAT. ch. 110, para. 1-104 (Smith-Hurd 1983) (same); IND. CODE ANN. §§ 34-5-1-2, 34-5-2-1 (Burns 1986) (confirming court's inherent rule-making power also granting authority to court to make future or past conflicting legislative acts void, respectively); IOWA CODE ANN. §§ 602.4104, 602.1205 (West 1988) (granting supreme court rule-making authority "for the orderly and efficient administration of judicial business"); KY. REV. STAT. ANN. § 447.154 (Baldwin 1990) (establishing that no statute can limit supreme court's right to promulgate rules); ME. REV. STAT. ANN. tit. 4, §§ 8-9 (1964) (granting supreme court rule-making authority); MASS. GEN. LAWS ANN. ch. 211, § 3, ch. 213, § 3 (West 1986) (same); NEV. REV. STAT. ANN. § 2.120 (Michie 1986) (same); N.H. REV. STAT. ANN. § 490:4, 491:10 (1983) (same); N.C. GEN. STAT. § 7A-34 (1989) (same); N.D. CENT. CODE § 27.02.08 (1974) (same); R.I. GEN. LAWS ANN. §§ 8-6-3 to -4 (1985) (establishing preeminent supreme court rule-making authority); TENN. CODE ANN. §§ 16-3-401 to -407 (Supp. 1990) (establishing supreme court rule-making authority but requiring approval by legislature); UTAH CODE ANN. § 78-2-3 (1987) (creating rule-making authority for court but also providing for amendment by legislature upon two-thirds vote of all members of both houses); W. VA. CODE § 51-1-4 (1981) (granting supreme court rule-making authority); WIS. STAT. ANN. § 751.12 (West 1981) (same); WYO. STAT. ANN. § 5-2-114 (1977) (same).

⁸⁷ See, e.g., ALA. CONST. art. VI, § 11 (amend. no. 328, designated 6.11) (granting supreme court rule-making authority); ARIZ. CONST. art. VI, § 5, para. 5 (same); COLO. CONST. art. VI, § 21 (same); DEL. CONST. art. IV, § 13, para. 1 (same); FLA. CONST. art. V, § 2(a) (same); HAW. CONST. art. VI, § 7 (same); KAN. CONST. art. III, § 1 (grants court general administrative authority over courts); MD. CONST. art. IV, § 18(a) (grants supreme court rule-making authority); MICH. CONST. art. VI, § 25 (same); MO. CONST. art. V, § 25 (same); MONT. CONST. art. VII, § 2, para. 3 (same); NEB. CONST. art. V, § 5 (same); N.J. CONST. art. VI, § 2, para. 3 (same); N.C. CONST. art. IV, § 13(2) (granting rule-making authority over appellate courts to supreme court and over trial courts to legislature); OHIO CONST. art. IV, § 5(B) (granting supreme court rule-making authority); PA. CONST. art. V, § 10(c) (same); S.C. CONST. art. V, § 5 (same); S.D. CONST. art. VI, § 12 (same); TEX. CONST. art. V, § 25 (1891, repealed 1985) (same); VA. CONST. art. VI, § 5 (same).

⁸⁸ See, e.g., ARIZ. CONST. art. VI, § 5, para. 5 (granting rule-making authority to supreme court); COLO. CONST. art. VI, § 21 (same); DEL. CONST. art. IV, § 13, para. 1 (same); HAW. CONST. art. VI, § 7 (same); MICH. CONST. art. VI, § 5 (same); MONT. CONST. art. VIII, § 2, para. 3 (same); NEB. CONST. art. V, § 5 (same); N.J. CONST. art. VI, § 2, para. 3 (same); N.C. CONST. art. IV, § 13(2) (lower appellate courts) (same); S.C. CONST. art. V, § 5 (granting supreme court rule-making authority); S.D. CONST. art. V, § 12 (same); TEX. CONST. art. V, § 25 (1891, repealed 1985) (same); VA. CONST. art. VI, § 5 (same).

is that no rule issued by the court "shall abridge, enlarge or modify the substantive rights" of any litigant,⁸⁹ while some states have provided that the court-made rules be "subject to law."⁹⁰

⁸⁹ See, e.g., ALA. CONST. art. VI, § 11 (amend. no. 328 designated as 6.11) (granting rule-making authority to supreme court); MO. CONST. art. V, § 5 (same); OHIO CONST. art. IV, § 5(B) (same); PA. CONST. art. V, § 10(c) (same); ARK. STAT. ANN. §§ 16-11-301, -302 (1987) (granting court rule-making authority in civil cases); CONN. GEN. STAT. ANN. § 51-14(a) (West 1988) (same); GA. CODE ANN. § 15-2-18 (1990) (same); IDAHO CODE § 1-212 (1990) (same); ME. REV. STAT. ANN. tit. 4, §§ 8-9 (1964) (same); NEV. REV. STAT. ANN. § 2.120 (Michie 1986) (same); N.D. CENT. CODE § 27-02-08 (1974) (same); WIS. STAT. ANN. § 751.12 (West 1981) (same); WYO. STAT. ANN. § 5-2-114 (1977) (same).

⁹⁰ N.J. CONST. art. VI, § 2, para. 3. See also ME. CONST. art. V, § 5 (providing that court rules may not change substantive rights and may be annulled or amended by law); MONT. CONST. art. VII, § 2, para. 3 (providing that court rules are subject to disapproval by legislature); NEB. CONST. art. V, § 25 (providing that court may promulgate rules not in conflict with laws governing such matters); N.C. CONST. art. IV, § 13(2) (granting legislature rule-making authority over trial courts); PA. CONST. art. V, § 10(c) (stating that right of court to promulgate rules does not affect right of General Assembly to determine jurisdiction of any court or justice of peace, nor suspend or alter any statutes of limitation); S.D. CONST. art. V, § 12 (providing that legislature may change rules); VA. CONST. art. VI, § 5 (providing that court rules shall not be in conflict with general law as rules can be established by General Assembly from time to time); N.H. REV. STAT. ANN. §§ 490:4, 491:10 (1983) (providing that court rules must be consistent with laws); N.C. GEN. STAT. § 7A-34 (1989) (providing that court may make rules supplementary to, and not inconsistent with, acts of General Assembly).

Tennessee and Utah have provided opposite schemes with respect to which branch will be superior in rule-making. Tennessee has granted primary authority to the legislature by requiring that the court-made rules be approved by resolutions of both houses of the assembly, whereas Utah has provided that the legislature may merely amend the court's rules by a "two-thirds vote of all members of both houses of the legislature." See Tenn. Code Ann. § 16-3-401 to -407 (Supp. 1990), UTAH CODE ANN. § 78-2-3 (1987).

Georgia has provided that "the Supreme Court . . . shall have the power to prescribe, modify, and repeal rules of procedure, pleading, and practice" in civil and criminal cases with the limitation that such rules "not abridge, enlarge, or modify the substantive rights of any litigant." GA. CODE ANN. § 15-2-18(a) (1990). However, the rules adopted or prescribed by the supreme court must "be reported by the court to the General Assembly . . . [and] shall not take effect until . . . ratified and confirmed by the General Assembly. . . ." GA. CODE ANN. § 15-2-18(b) (1990). The General Assembly of Georgia has also codified that it maintains a rule-making authority along with the supreme court's power to "repeal, modify, or amend" the rules. GA. CODE ANN. § 15-2-18 (1990).

North Dakota has provided a statutory scheme whereby the supreme court is granted authority to make rules as "necessary for the administration of justice" in civil and criminal cases, N.D. CENT. CODE § 27-02-08 (1974), but N.D. CENT. CODE § 27-02-09 (1974) grants the legislature authority to regulate procedure. The legislature's rule-making authority is then made subservient to the authority of the court to make rules in N.D. CENT. CODE § 27-02-09 (1974). However, no court-made rule may "abridge, enlarge, or modify the substantive rights" of any litigant. N.D. CENT. CODE § 27-02-10 (1974).

Some courts have found an inherent rule-making power in constitutional provisions granting the supreme court a general power over the courts of the state. In *Ricarte v. State*,⁹¹ the Supreme Court of Arkansas assumed the power to adopt the Uniform Rules of Evidence for the state courts.⁹² Although the evidentiary rules had already been adopted by the legislature, the Arkansas court explained that at the time of their adoption the legislature was unlawfully in session due to their exceeding the state constitution's provision for a regular 60-day session.⁹³ Recognizing a "steady trend in favor of committing to the courts the regulation of practice and procedure,"⁹⁴ the *Ricarte* court found constitutional authority to prescribe the evidentiary rules for the Arkansas courts in the state constitution's vesting of "a general superintending control over all inferior courts of law and equity"⁹⁵ in the supreme court. The assumption of constitutional power to promulgate rules in *Ricarte* was grounded not only in the "superintending control" provision but also in a statutory delegation of power "to prescribe, from time to time, rules of pleading, practice, and procedure."⁹⁶ The Supreme Court of Arkansas did not address, however, whether the legislature or the supreme court was paramount in procedural rule-making.⁹⁷

⁹¹ 290 Ark. 100, 717 S.W.2d 488, 489 (1986).

⁹² *Ricarte*, 717 S.W.2d at 489-90. The Uniform Rules of Evidence were actually adopted by the Arkansas Supreme Court in *In re Adoption of the Uniform Rules of Evidence*, 717 S.W.2d 491 (Ark. 1986).

⁹³ *Ricarte*, 717 S.W.2d at 489.

⁹⁴ *Id.*

⁹⁵ *Id.* at 490 (citing ARK. CONST. art. VII, § 4). The Supreme Court of New Mexico also relied on a constitutional grant of "superintending control over all inferior courts" to declare an evidentiary privilege created by the legislature void. *Ammermon v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354, 1357 (1976), *cert. denied*, 436 U.S. 906 (1978).

⁹⁶ *Ricarte*, 717 S.W.2d at 490. The Arkansas legislature has by statute established that the supreme court has rule-making power in civil and criminal cases. ARK. STAT. ANN. §§ 16-11-301 and -302 (1987) (providing rule-making authority in criminal and civil cases, respectively).

⁹⁷ Although the court did not claim exclusive rule-making authority, dicta in a later case leads one to assume the court is pointing toward claiming supremacy over the rules. See *Johnson v. State*, 292 Ark. 732, 732 S.W.2d 817, 828 (1987) (Dudley, J., concurring) (stating court's refusal to adopt legislative evidentiary statute).

The question of whether the legislature or the court was paramount in rule-making had been left open in New Mexico prior to *Ammerman*; however, the court in *Ammerman* answered the question, stating "the Legislature lacks power to prescribe by statute rules of evidence and procedure." *Ammerman*, 551 P.2d at 1359. The bases for the court's decision were that the evidentiary rule provided no person a privilege unless it was provided by the constitution or by "other rules . . . adopted by the Supreme Court"

In Connecticut, the supreme court found that it had exclusive authority over rules of practice and procedure even in the absence of a constitutional provision granting it such power.⁹⁸ In *State v. Clemente*,⁹⁹ the Connecticut Supreme Court held that certain criminal discovery rules provided by the legislature were unconstitutional.¹⁰⁰ The court held that the legislature's enactment of discovery rules was an attempt "to exercise an inherently and exclusively judicial power in violation of the separation of powers provided in articles second and fifth of the Connecticut Constitution."¹⁰¹ In the wake of *Clemente*, the Connecticut Supreme Court expressed that its rule-making power does not include the right to determine substantive rights and remedies¹⁰² but nonetheless has continued to exercise exclusive control over the rules of practice and procedure.¹⁰³

In *People v. Jackson*,¹⁰⁴ the Illinois Supreme Court exerted greater control over rules of procedure than it had previously recognized. In *Jackson*, the court refused to apply a statute providing for voir dire examination by counsel and instead applied a court-conducted voir dire examination as prescribed by a court-promulgated rule.¹⁰⁵ In avoiding the statute, the court explained that the Illinois Constitution

and that the Supreme Court was vested with "a superintending control" over the courts by the constitution. *Id.* at 1358 (citing N.M.R.E. 51 and N.M. CONST. art. III, § 1 and art. VI, § 3). The New Mexico Supreme Court now enjoys exclusive control over the rules of evidence and procedure. *See State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975) (stating that legislature lacks power to prescribe by statute rules of practice and procedure).

⁹⁸ *See State v. Clemente*, 166 Conn. 501, 353 A.2d 723, 735 (1974) (explaining that prescription of discovery rules is inherently and exclusively judicial function); *State ex rel. Kelman v. Schaffer*, 161 Conn. 522, 529, 290 A.2d 327, 331 (1971) (stating that general assembly lacks any power to make rules of administration, practice or procedure binding on supreme court or superior court); *Adams v. Rubinow*, 157 Conn. 150, 251 A.2d 49, 56 (1968) (stating that general assembly has no power to make rules). *See generally Kay*, *supra* note 8, at 1-4 (discussing Connecticut cases and development of court's rule-making power).

⁹⁹ 166 Conn. 501, 353 A.2d 723, 723 (1974).

¹⁰⁰ *Id.* 353 A.2d at 731.

¹⁰¹ *Kay*, *supra* note 8, at 3.

¹⁰² *Steadwell v. Warden*, Conn. Corrections Inst., 186 Conn. 153, 439 A.2d 1078, 1084 (1982); *see also Mitchell v. Mitchell*, 194 Conn. 312, 481 A.2d 31, 37 (1984) (stating that "where statute creates a substantive right, a conflicting practice book rule cannot stand").

¹⁰³ For a detailed analysis of the development of the exclusive judicial authority to promulgate rules of practice and procedure in Connecticut, *see Kay*, *supra* note 8, at 1-43.

¹⁰⁴ 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

¹⁰⁵ *Jackson*, 371 N.E.2d at 604.

granted it "general administrative and supervisory authority" and that such power included "everything necessary for the full performance of judicial functions."¹⁰⁶ Since the legislature's *voir dire* statute was inconsistent with that provided by the state supreme court and because the court held this "general administrative and supervisory authority," the *Jackson* court concluded that its rule superceded the statute.¹⁰⁷ Apparently, although the Illinois Supreme Court recognized the legislature's authority to enact statutes for the governance of procedure and practice, the court rules take priority over any such statute.¹⁰⁸

¹⁰⁶ *Id.* The Illinois Constitution provides that the supreme court has "general administrative and supervisory authority" over the inferior courts. ILL. CONST. art. VI, § 16 (Smith-Hurd 1983).

¹⁰⁷ *Jackson*, 371 N.E.2d at 606. Illinois courts now adhere to the principle that where a statute conflicts with a court rule, the court "rule will prevail." *Dunaway v. Ashland Oil, Inc.*, 189 Ill. App. 3d 106, 544 N.E.2d 1313, 1321 (1989).

¹⁰⁸ *Dunaway*, 544 N.E.2d at 1321. Although the Supreme Court of Illinois is granted the power to make rules by the legislature, *see* ILL. ANN. STAT. ch. 110, para. 1-104 (Smith-Hurd 1983), the Illinois courts recognize that the legislature also "has the power to enact laws where it does not unduly infringe upon the inherent power of the judiciary." *Dunaway*, 544 N.E.2d at 1321.

As strange as it seems, the comment to the Illinois statute states that its purpose is "to make clear that the power of the court to make rules governing practice, pleading and procedure is . . . inherent . . . rather than one which rests in legislative grant." It appears odd to this author that a legislature would recognize an "inherent" power by statute considering that an "inherent" power is by definition one that is not explicitly granted; therefore, if the power is expressly granted, it is not "inherent" but "expressed." Nevertheless, other states have also recognized courts' "inherent" rule-making authority by statute. *See, e.g.*, IDAHO CODE § 1-212 (1980) (recognizing state supreme court's inherent power to make rules governing procedure in all state courts); IND. CODE ANN. § 34-5-1-2 (Burns 1986) (same); KY. REV. STAT. ANN. § 447.154 (Baldwin 1989) (same).

Somewhat similar to Illinois is the scheme provided for rule-making in Idaho. The inherent rule-making power of the Idaho Supreme Court is recognized in IDAHO CODE § 1-212 (1980), and the supreme court is authorized to prescribe rules for the Idaho courts in IDAHO CODE §§ 1-213 (1980). Also, the Idaho Constitution provides that "no person or collection of persons charged with the exercise of powers properly belonging to one . . . department [of government] shall exercise any powers properly belonging to [another department]" IDAHO CONST. art. 2, § 1. The statutory provision granting the court rule-making authority and the constitutional limitation on the separate departments of government have been interpreted to grant "only limited authority to the Legislature to enter into the judicial field of rule-making" *R.E.W. Constr. Co. v. District Court of Third Judiciary Dist.*, 400 P.2d 390, 397 (Idaho 1965). It is clear in Idaho that the supreme court "may by rule . . . make inapplicable procedural statutes which conflict with [the] present court system." *State v. Griffith*, 97 Idaho 52, 539 P.2d 604, 610 (1975); *see also State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971) (recognizing court's rule-making power).

Similarly, the Indiana legislature has affirmed the Supreme Court's inherent rule-making power by statute. *See* IND. CODE ANN. § 34-5-1-2 (Burns 1986). Although the

Florida has also struggled with the issue of where rule-making authority should be vested. As early as 1824, the Florida legislature exercised rule-making authority, but contemporaneously the supreme court recognized its own inherent power to prescribe rules of practice and procedure.¹⁰⁹ One author noted "[a]s a result, there evolved a gray area of overlapping or coordinate authority in rule-making between the legislature and the judiciary."¹¹⁰ However, the concurrent authority over rules between the legislature and the judiciary in Florida did not create substantial problems, because the supreme court "acquiesced in legislative control over rule-making."¹¹¹ Although the court assumed inherent power to promulgate rules, this power was recognized by the court to be subject to the laws passed by the legislature.¹¹² In 1956, the Florida Constitution was revised, providing that "[t]he practice and procedure in all courts shall be governed by rules adopted by the supreme court."¹¹³ Due to this constitutional provision, "the judiciary has considered any attempt by the legislature to create rules of practice and procedure to be an encroachment of its power, as an independent branch of government, in violation of the separation of powers doctrine."¹¹⁴ To implement the separation of powers doctrine, the court has "adopted a 'substantive rights' theory to define the limits of its authority."¹¹⁵ The difficulty in determining whether a particular rule is

General Assembly of Indiana adopted the Indiana Rules of Trial Procedure in IND. CODE ANN. § 34-5-1-6 (Burns 1986), the supreme court is explicitly granted power to "adopt, amend and rescind rules of court . . . which . . . govern and control practice and procedure in all the courts of [the] state . . . and thereafter all laws in conflict therewith . . . [are] of no further force or effect." IND. CODE ANN. § 34-5-2-1 (Burns 1986). It is clear today that the Indiana Supreme Court "is vested with inherent authority to promulgate procedural rules, and legislative enactments in conflict . . . must succumb to the paramount authority of [the] Supreme Court." *Thompson v. State*, 380 N.E.2d 1292, 1293 (Ind. 1978); see *State v. Bridenhager*, 279 N.E.2d 794, 796 (Ind. 1972) (court rules govern over statutory procedural rules). However, like Illinois and Idaho, if legislatively enacted rules are consistent and compatible with the court rules, they are given full effect. *Neeley v. State*, 305 N.E.2d 434, 435 (Ind. 1974).

¹⁰⁹ Silver, *supra* note 46, at 275.

¹¹⁰ *Id.* at 274.

¹¹¹ *Id.* at 275.

¹¹² See, e.g., *Earle v. Detroit & Sec. Trust Co.*, 103 Fla. 618, 138 So. 65, 67 (1931) (court stated that statutes are preeminent to court promulgated rules); *Bryan v. State*, 94 Fla. 909, 114 So. 773, 773 (1927) (same); *Holder Turpentine Co. v. M.C. Kiser Co.*, 68 Fla. 312, 67 So. 85, 86 (1914) (same).

¹¹³ FLA. CONST. art. V, § 3 (1957, amended 1972).

¹¹⁴ Silver, *supra* note 46, at 276.

¹¹⁵ *Id.* at 277. In an attempt to not promulgate rules establishing substantive rights, which the court has recognized to be within the exclusive province of the legislature, the Florida Supreme Court evaluates rules before they are adopted to determine whether

substantive or procedural has created "confusion" in the Florida Supreme Court's rule-making power and has led to "conflict between the judiciary and the legislature."¹¹⁶ Despite the imprecision in the Florida theory for determining rule-making authority, the rule remains that "[u]nless an enactment of the legislature is substantive rather than procedural, the legislature has exceeded its rule-making authority."¹¹⁷

The majority of American jurisdictions have clarified by statute or constitution which branch of the government has the authority to promulgate rules of practice and procedure.¹¹⁸ Generally, authority over rules is enjoyed concurrently by the legislative branch and the judicial branch with express limitations that court rules not "abridge, enlarge or modify the substantive rights" of litigants and that court-promulgated rules are subject to legislative statutes.¹¹⁹ In most jurisdictions, where the legislature has been forbidden to prescribe rules, the state constitution explicitly grants rule-making authority to the judiciary.¹²⁰

they are "substantive" or "procedural." See *id.* at 276-77 (discussing substantive rights theory of Florida court); Note, *The Rule-making Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87 (1971) (discussing Florida Supreme Court's substantive rights theory and difficulty of deciding whether rule is substantive or procedural); see, e.g., *In re* Amendment of Florida Evidence Code, 404 So. 2d 743, 743 (Fla. 1981) (explaining court adopting procedural rules but not substantive rules); *In re* Florida Evidence Code, 372 So. 2d 1369, 1369 (Fla. 1979) (same); *Johnson v. State*, 308 So. 2d 127, 128 (Fla. 1975) (same).

¹¹⁶ Silver, *supra* note 46, at 277.

¹¹⁷ *Id.* Although the Florida Supreme Court has constitutional authority to promulgate rules of evidence and procedure, article V, § 2(a) of the Florida Constitution provides that the legislature may repeal the rules "by general law enacted by two-thirds vote of the membership of each house" FLA. CONST. art. V, § 2(a). This provision has been recognized and upheld by the Florida Supreme Court. See, e.g., *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976) (recognizing legislature's right to repeal by two-thirds vote). The Supreme Court of Florida has however placed certain significant limitations on the legislature's right to repeal. See, e.g., *Johnson*, 336 So. 2d at 95 (stating that although court has right to repeal by two-thirds vote, power to initiate them rests in Supreme Court); *Carter v. Sparkman*, 335 So. 2d 802, 808 (Fla. 1976) (explaining that legislature's repeal of court-promulgated rule is of no effect unless each member voting to repeal has knowledge and specific intent to override judgment of supreme court as to a specific rule of practice or procedure), *cert. denied*, 429 U.S. 1041 (1977); *In re* Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 204 (Fla. 1973) (explaining that although legislature may repeal any rule of Supreme Court by two-thirds vote, it has no constitutional authority to enact any law relating to practice and procedure).

¹¹⁸ See *supra* notes 85-89 and accompanying text.

¹¹⁹ See *supra* notes 88, 89 and accompanying text.

¹²⁰ See ARIZ. CONST. art. VI, § 5, para. 5 (supreme court has power to make procedural rules in all state courts); COLO. CONST. art. VI, § 21 (same); DEL. CONST. art. IV, § 13, para. 1 (same); KAN. CONST. art. V, § 6 (same); MICH. CONST. art. VI, § 5 (same); N.J. CONST. art. VI, § 2, para. 3 (same); OHIO CONST. art. IV, § 5(B) (same); PA. CONST. art. v,

In states such as Arkansas and Illinois, where the supreme courts have found judicial rule-making power in the absence of an explicit grant by the constitution, the court has continued to recognize the legislature's authority to create rules.¹²¹ Only in Mississippi, Connecticut, and New Mexico have the highest courts proclaimed an exclusive rule-making power in the absence of a constitutional provision granting the court such power,¹²² and the Mississippi Supreme Court stands alone as the only court to claim exclusive rule-making authority despite a constitutional provision vesting that power with the legislature.¹²³

IV. ALTERNATIVE THEORIES THE MISSISSIPPI SUPREME COURT COULD UTILIZE TO IMPLEMENT RULES

Although this author respects the court's authority to make rules, the absolution of *Hall* that all legislatively-made rules are automatically unconstitutional seems unnecessary to improve the practice and procedure in the courts of Mississippi. The court could have employed a more modest approach in exercising its rule-making powers.

In the federal courts, the United States Supreme Court has used prudential doctrines to minimize federal-state conflicts and to avoid separation of powers confrontations. For example, it has refused to use the republican form of government clause to intrude into state govern-

§ 10(c) (same). The New Jersey constitution grants the court rule-making authority but also limits it by making the power "subject to law." The New Jersey Supreme Court has interpreted this to be a limitation that court-made rules not encroach upon substantive law. *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, 410 (1950). This opinion has been highly criticized in Kaplan & Green, *The Legislature's Relation to Judicial Rule-making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

In Alabama and Florida, the state constitutions provide for judicial supremacy over the rules by requiring a two-thirds vote of the legislature to annul a court-made rule. See ALA. CONST. art. IV, § 15; FLA. CONST. art. V, § 2(a). Generally, courts are granted rule-making power by the constitution, but such power is subject to modification by the legislature. MD. CONST. art. IV, § 18, 18A; MO. CONST. art. V, § 5, MONT. CONST. art. VII, § 2, para 3; NEB. CONST. art. V, § 25; S.C. CONST. art. V, § 4A; S.D. CONST. art. V, § 12; TEX. CONST. art. V, § 25; VT. CONST. ch. II, § 30; VA. CONST. art. VI, § 5. The legislature is granted authority over rules of practice and procedure in the following constitutional provisions: GA. CONST. art. VI, § 2, para. 4; IOWA CONST. art. V, § 14; MINN. CONST. art. VI, § 14; UTAH CONST. art. VI, § 26; W. VA. CONST. art. VI, § 39; WYO. CONST. art. III, § 27.

¹²¹ See *supra* notes 90-95 and 103-107 and accompanying text.

¹²² See *supra* notes 53, 90-102 and 118 and accompanying text. However, the Connecticut Supreme Court still recognizes the limitation on its rule-making power that it not prescribe rules which "abridge, enlarge or modify . . . substantive rights . . ." See *supra* note 101 and accompanying text.

¹²³ See *supra* note 62 and accompanying text.

mental affairs,¹²⁴ has required federal courts to obtain and defer to state courts,¹²⁵ and has created various privileges and immunities for Congress and the executive branch.¹²⁶

The Mississippi Supreme Court might also consider creating prudential doctrines that would preserve the court's authority and at the same time recognize that the legislature is the primary maker of public policy in the State. The following doctrines are representative of possible approaches:

A. *A Doctrine of Obsolescence*

The Mississippi Supreme Court could take the position that it was necessary to enact uniform rules of civil procedure, evidence, and Supreme Court rules to create uniformity between state and federal practice and to modernize court rules and procedures. The court could justify its adoption of the rules on a premise similar to that argued by Professor Calabrezze in *A Common Law of Statutes*¹²⁷ by holding that Mississippi's legislatively-made court rules were obsolete and it was time for the court to properly change them. Although this doctrine does not dispose of the problem of how to handle new statutes, it is an alternative to the separation of powers justification the court gave for its adoption of the rules.

B. *Presumption of Constitutionality*

The court could adopt a presumption that a legislatively-made rule is constitutional until the court's rules committee suggests the adoption of a superseding new rule. Originally, the court invalidated statutes only after the rules committee had studied the matter and recommended such a change. As a prudential matter, it seems most appropriate for the court to utilize its inherent rule-making power to invalidate legislative statutes only when the advisory committee has deemed it necessary.

One collateral consequence of such a doctrine would be that litigants and lawyers would be entitled to rely on the validity of statutes until they were prospectively invalidated by the court. Also, this doc-

¹²⁴ *Luther v. Bordon*, 48 U.S. 1, 42 (1849).

¹²⁵ *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941); *Younger v. Harris*, 401 U.S. 37, 50-54 (1971).

¹²⁶ *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

¹²⁷ See Calabresi, *A Common Law for the Age of Statutes* 5-7 (1982) (increasing "statutorification" of American law has often frozen obsolescence and courts have used this as pretext for judicial intervention).

trine would maintain the legislature as the medium through which the people of Mississippi could make their desires known.

C. *Constitutional Doctrine of Last Resort*

The court should invalidate a statute as infringing the court's authority only when the court has determined the statute is not invalid under other explicit sections of the constitution. In other words, the inherent rule-making power should be a doctrine of last resort.

Hall is exemplary of where this doctrine would have been appropriate. Clearly, the court could have decided that the child abuse statute at issue in *Hall*¹²⁸ violated the state confrontation clause¹²⁹ instead of dealing with the inherent powers question. If the court had decided that the statute was unconstitutional due to the confrontation clause, the inherent powers controversy could have been avoided.

D. *The Doctrine of Uniformity*

Consideration should also be given to whether a particular statute passed by the legislature is in conformity with similar statutes adopted by other states. The court should give deference to legitimately created rules that show a reaction to modern developments in the law. Before declaring a given statute violative of the court's inherent power, the court should consider national uniformity, since uniformity was one of the primary incentives for the adoption of the new rules of evidence.

CONCLUSION

The debate over what branch of the government has the authority to promulgate rules of practice and procedure has a long and well doc-

¹²⁸ See *supra* note 33 and accompanying text.

¹²⁹ Miss. CONST. art. III, § 26. The state confrontation clause provides:

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

Id. The Mississippi Supreme Court easily could have used the confrontation clause to strike down the statute. This would have avoided the inherent powers question altogether.

umented lineage. Logically and practically, courts must have an inherent rule-making authority for the fair and efficient administration of justice, but such authority should not be exclusively vested in the judiciary. In Mississippi, the constitution grants the legislature the authority to "regulat[e] the practice in the courts of justice"¹³⁰ and such a constitutional provision cannot be ignored. Although the separation of powers doctrine may imply that the supreme court has a rule-making power, such power does not patently exclude the legislative branch from the rule-making arena. In the midst of this constitutional controversy, the court and the legislature should recognize the desirability of close cooperation in providing sound judicial procedure for the citizens of the state. Prior to the *Hall* decision, the legislature recognized in the Rules Enabling Act the court's obligation to make rules of practice, and the court recognized the validity of legislative excursions into rule-making when such rules promoted the fair and efficient administration of justice within the confines of the Constitution.¹³¹ In the absence of the repeal of section 90(s) of the Mississippi Constitution, the court cannot constitutionally justify its assumption of exclusive rule-making authority. The court and the legislature should exercise concurrent jurisdiction over the rules of practice and procedure, with the court's authority being preeminent. The court should bear the responsibility for improvement of practice and procedure to reduce the expenditure of time, effort, and money by litigants, but the legislature should be accorded more than "fiat" authority to enforce the policy that it establishes for the benefit of the citizens of Mississippi.

F. Keith Ball

¹³⁰ See *supra* notes 62, 63 and accompanying text.

¹³¹ See *supra* notes 6-14 and accompanying text.

BANKRUPTCY—INSIDER PREFERENCES—THE APPROACH OF THE FIFTH CIRCUIT COURT OF APPEALS TO THE ISSUE OF NON-INSIDER LIABILITY FOR PREFERENTIAL TRANSFERS BENEFITTING INSIDER GUARANTORS

This comment will explore the potential liability of transferees of payments made to reduce the contingent liability of insider guarantors within the year preceding bankruptcy of the debtor. Accordingly, it will explain the history of preference actions, the method by which the trustee can avoid transfers and recover them into the estate under current bankruptcy law, possible approaches to the issue of initial transferee liability and the apparent approach of the Fifth Circuit Court of Appeals to the issue. Finally, this comment will recommend a course of action for the Fifth Circuit Court of Appeals regarding this matter.

I. INTRODUCTION

In 1980, the City of Chicago awarded V.N. Deprizio Construction Company a \$13.4 million contract for work on the extension of the Chicago Subway System to O'Hare Airport.¹ Despite the apparent failure of the company to complete the work and its subsequent financial troubles, the City of Chicago loaned \$2.5 million to V.N. Deprizio Construction Company to help it complete the work in 1983.² This unusual loan was apparently prompted by the desire of the incumbent mayor, Jane Byrne, to ensure completion of the line before the mayoral elections of 1983.³

Because of the unusual nature of the loan made by the City of Chicago and a subsequent \$3,000 contribution to Mayor Byrne's campaign fund, other dealings of the firm's president, Richard N. Deprizio, and an alleged affiliation of Mr. Deprizio with organized crime, the United States Attorney opened an investigation of the construction company.⁴ In April 1983, V.N. Deprizio Construction Company filed a petition under the Bankruptcy Reform Act of 1978 (Bankruptcy Code).

Subsequently, it seemed apparent that the United States would

¹ *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1187 (7th Cir. 1989).

² *Id.*

³ *Id.*

⁴ *Id.*

indict Mr. Deprizio.⁵ It also seemed apparent that Mr. Deprizio would attempt to bargain with authorities by exposing the details of his apparently illegal activities, as well as those of others. These events and circumstances precipitated the demise of Mr. Deprizio in a fashion very eloquently described by the court as follows: "So in January 1986 Deprizio was lured to a vacant parking lot, where an assassin's gun and the obligations of a lifetime were discharged together. Corporations are not so easily liquidated."⁶

Quite expectedly, V.N. Deprizio Construction Company owed many creditors other than the City of Chicago.⁷ Richard N. Deprizio and other officers had personally guaranteed much of the indebtedness.⁸ V.N. Deprizio Construction Company paid down much of the indebtedness personally guaranteed by those individuals during the year immediately preceding the bankruptcy.⁹ Accordingly, the contingent liability of the guarantors was reduced.¹⁰ The question for the court was whether the transferees of those payments could be forced to return those payments to the estate because of the preferential nature of the payments with respect to the guarantors.¹¹

II. THE HISTORY OF PREFERENCE ACTIONS

Generally speaking, the question of whether or not the trustee could recover the payments made by V.N. Deprizio Construction Company back into the estate turned upon whether or not those payments were preferential in nature. The concept of preferential transfers is somewhat younger than that of bankruptcy itself and its genesis is worthy of explanation.

Although England enacted its first bankruptcy act as early as 1542, that act did not address preferential or even fraudulent transfers.¹² However, in 1571, Parliament made transfers of property with "the intent and effect of hindering, delaying, or defrauding creditors" a crime.¹³ Nonetheless, this statute did not reach conveyances which

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1187-88.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1192.

¹¹ *Id.* at 1188.

¹² Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 715 n.11 (1985) [hereinafter Countryman].

¹³ *Id.* at 714. The modern version of this statute is the Uniform Fraudulent Conveyance Act (U.F.C.A.). *Id.*

were not fraudulent in nature.¹⁴

Despite the lack of a clear statutory mandate for the recovery of preferences, the King's Bench took action in 1584 in *The Case of Bankrupts*.¹⁵ The court held that commissioners who administered England's Bankruptcy Act could pass good title to property despite the debtor's transfer of that property to another creditor after bankruptcy.¹⁶

Lord Mansfield took up this edict of the King's Bench and used it as a basis for identifying two types of conveyances recoverable under the Bankruptcy Act in *Alderson v. Temple*.¹⁷ The first of these types was the transfer intended to defraud the creditor which had been addressed by the statute enacted in 1571.¹⁸ The second, which would become today's preferential transfer, was an act intended to defraud the bankruptcy law.¹⁹ Modern English law carries forth the approach of Lord Mansfield, and even today, the question of whether or not a preferential transfer will be avoided is dependent on whether the "debtor's 'dominant' intent was to prefer the creditor," regardless of the good faith of that creditor.²⁰

The first United States bankruptcy law was embodied in the Bankruptcy Act of 1800, which did not mention preferential transfers.²¹ American bankruptcy statutes addressed the issue for the first time in the Bankruptcy Act of 1841.²² The 1841 Act required that for a transfer to be avoidable as a preference, it must have been made by the debtor "in contemplation of bankruptcy, and for the purpose" of giving the transferee a "preference or priority over the general creditors."²³ Thus, American bankruptcy laws retained vestiges of the English law in that the intent of the debtor was deemed an issue in the determination of whether or not a transfer was preferential in nature.²⁴ However, by 1910, any inquiry into the state of the mind of the debtor had disappeared from the concept of a preferential transfer under United States bankruptcy law.²⁵

¹⁴ *Id.* at 715-16.

¹⁵ 76 Eng. Rep. 441 (K.B. 1584).

¹⁶ *Bankrupts*, 76 Eng. Rep. at 474.

¹⁷ 96 Eng. Rep. 384 (K.B. 1768).

¹⁸ *Alderson*, 96 Eng. Rep. at 385; see *supra* note 13 and accompanying text.

¹⁹ *Id.*

²⁰ Countryman, *supra* note 12, at 718.

²¹ *Id.* at 718-19.

²² *Id.* at 719.

²³ *Id.* (quoting 5 Stat. 440, § 2 (1841)).

²⁴ *Id.*

²⁵ *Id.* at 723.

Strictly speaking, the issue raised in the case of V.N. Deprizio Construction Company is whether or not transfers were made which defrauded the bankruptcy laws of the United States. While no search for the intent of Mr. Deprizio is necessary, the Bankruptcy Reform Act places limits upon the extent to which the trustee in bankruptcy will be allowed to avoid and recover preferential transfers. The limits are both temporal and substantive in nature, and the extent to which they may be stretched is the heart of the matter addressed herein.

III. THE MECHANICS OF THE APPROACH OF THE BANKRUPTCY CODE TO PREFERENTIAL TRANSFERS

The Bankruptcy Code today embodies the concept of the avoidability of preferential transfers in section 547(b).²⁶ Most important among the requirements for these purposes are sections 547(b)(1) and 547(b)(4).²⁷ The former requires that for any transfer to be preferential, it must be to or for the benefit of a creditor. The latter subparagraph allows the trustee to examine all transfers to or for the benefit of insiders within one full year preceding filing for insiders and within ninety days for all others.²⁸

Section 101 of the Code provides definitions necessary for an understanding of the above test for determining whether or not a transfer

²⁶ 11 U.S.C. § 547(b) (1988). Section 547 states that under the Bankruptcy Code, the trustee in bankruptcy:

may avoid any transfer of an interest of the debtor in property:

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id. Section 547(f) states, "For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." 11 U.S.C. §§ 547(b)(1)-(b)(4)(1988).

²⁷ *Id.*

²⁸ *Id.*

is deemed preferential.²⁹ It defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor. . . ."³⁰ The Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. . . ."³¹ Therefore, one who guarantees a loan for a corporation certainly becomes a creditor of that corporation, since it has a contingent claim against the debtor.³²

The Code's definition of an "insider" is also relevant. For a debtor which is actually a corporation, the Code includes the following parties in its definition of "insider":

- (i) director of the debtor;
- (ii) officer of the debtor;
- (iii) person in control of the debtor;
- (iv) partnership in which the debtor is a general partner;
- (v) general partner of the debtor; or
- (vi) relative of a general partner, director, officer, or person in control of the debtor. . . .³³

Without a doubt, this definition of insider will almost always encompass those who have guaranteed loans for the corporation. Thus, there are often insiders who are also creditors of a debtor corporation by virtue of their having guaranteed a loan for the debtor. Returning to section 547(b) of the Code,³⁴ it is clear that transfers to insiders meeting all of the requirements may be avoided by the trustee, if the transfers occurred within one year of the debtor's filing for bankruptcy.³⁵

However, a lender which receives payments on a debt is not likely an insider of the debtor corporation. If payments to the lender are outside of the ninety-day preference period prescribed by section 547(b)(4)(A),³⁶ then the transfer to a lender which is not an insider

²⁹ 11 U.S.C. § 101 (1988).

³⁰ 11 U.S.C. § 101(9)(A) (1988).

³¹ 11 U.S.C. § 101(4)(A) (1988).

³² Katzen, *Deprizio and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guarantees, and Other Perils of Initial Transferee Liability*, 45 BUS. LAW 511, 514 n.11 (1990) [hereinafter Katzen].

³³ 11 U.S.C. § 101(30)(B) (1988).

³⁴ 11 U.S.C. § 547(b) (1988).

³⁵ 11 U.S.C. § 547(b)(4) (1988).

³⁶ 11 U.S.C. § 547(b)(4)(A) (1988).

does not fall within the requirements of section 547(b).³⁷

Nevertheless, section 547(b)³⁸ can be used to avoid transfers to the lender up to one year before the filing, if an insider has guaranteed that loan.³⁹ This is because those payments to the lender benefit the insider by reducing the amount for which he could be held liable as a result of the guarantee.⁴⁰

The possibility that the trustee could avoid such payments is especially important since section 550 of the Bankruptcy Code allows recovery from either "the initial transferor of such transfer or the entity for whose benefit such transfer was made. . . ."⁴¹

Returning to the circumstances surrounding V.N. Deprizio Construction Company, it is important to remember that Richard N. Deprizio and other insiders had personally guaranteed at least the debts of the corporation.⁴² Thus, any payments made on those debts prior to the bankruptcy of V.N. Deprizio Construction Company reduced the contingent liability of those who had personally guaranteed the notes. Since those who had guaranteed the notes, particularly Richard N. Deprizio, were insiders, such a reduction of contingent liability benefitted those insiders. The unresolved question was whether the transferees of those payments who were clearly not insiders were liable for the payments made during the year immediately preceding the bankruptcy filing of V.N. Deprizio Construction Company.

Generally, courts have taken three approaches to this issue. One approach advocates a strict reading of the statute which results in liability of the initial transferee for a transfer as apparently mandated by the statute. Another approach takes an equitable stance and does not allow recovery from the lender where it is improper to do so for equitable reasons. Finally, a third approach is based upon such a transfer

³⁷ *Id.*

³⁸ 11 U.S.C. § 547(b) (1988).

³⁹ 11 U.S.C. § 547(b)(4)(B) (1988).

⁴⁰ Nutovic, *The Bankruptcy Preference Laws: Interpreting Code Sections 547(c)(2), 550(a)(1), and 546(a)(1)*, 41 BUS. LAW. 175, 187-88 (1985).

⁴¹ 11 U.S.C. § 550(a)(1988). The relevant portion of section 550 states:

Except as otherwise provided in this section, to the extent that a transfer is avoided under sections 554, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transfer of such transferee or the entity for whose benefit such transfer was made

Id.

⁴² *Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 874 F.2d 1186, 1187-88 (7th Cir. 1989).

actually being two transfers—one for the benefit of the insider creditor and the other transfer to the lender.

A. *The Literal Interpretation of the Statutes*

The case of V.N. Deprizio Construction Company was styled *Levit v. Ingersoll Rand Financial Corp.*,⁴³ and it provided the Seventh Circuit Court of Appeals with the opportunity to interpret the statutes in what the court deemed a literal fashion. In *Levit*, the court held the non-insider creditors liable for preferential transfers made to benefit insider guarantors.⁴⁴ First, the court rejected the two transfer approach as having been predicated upon a faulty definition of "transfer."⁴⁵ The court did so despite the unprecedented nature of such a holding and arguments regarding its effect on the cost of credit in the marketplace.⁴⁶ Although the non-insider lenders argued otherwise, the court

⁴³ *Id.* at 1186.

⁴⁴ *Id.* at 1194. The court summed up its reasoning as follows:

The textual argument . . . is simple. Section 547(b) defines which transfers are "avoidable." No one doubts that a transfer to Lender produces a "benefit" for Guarantor. After § 547 defines which transfers may be avoided, § 550(a) identifies who is responsible for payment: "the initial transferee of such transfer or the entity for whose benefit such transfer was made."

Levit, 874 F.2d at 1194 (emphasis added by court).

Additionally, the court referred to the need to ensure bankruptcy is, in fact, a collective proceeding. *Id.* To that end, the court intimated that fairness dictates that one creditor should not be allowed to benefit from its guarantee by insiders to the detriment of other creditors who have received such guarantees. *Id.* Interestingly, despite the court's self-professed interpretation of the statutes as they were intended to be interpreted by Congress, this approach is arguably activist in nature, since Congress could have chosen to not create two different preference periods for insiders and non-insiders.

⁴⁵ *Id.* at 1195. The court criticized the definition of "transfer" necessary to sustain this interpretation. *Id.* Significantly, the court explained that the two-transfer approach depends upon the equation of a "transfer" with a benefit received by the transferee. *Id.* The court distinguished the Code definition from this assumption by stating, "Section 101(50) . . . says that a transfer is a disposition of property . . ." *Id.* Further, the court stated that the disposition must be viewed from the perspective of the debtor. *Id.* at 1196. Therefore, the court reasoned, a single payment can only be considered one transfer. *Id.*

⁴⁶ *Id.* at 1198. The court went on to reason that the only likely effect of its holding on prices could be the increase in interest rates to reflect the slightly higher risk associated with loans having insider guarantees. *Id.* (Presumably, this increased rate would reflect the decreased possibility of a lender benefitting from payments made out of the ordinary course to benefit an insider).

The court then speculated that the increased liability for transferees associated with holding them accountable during the insider preference period could actually result in a more efficient debt collection process and, thereby, lower interest rates. *Id.* Ultimately,

then reasoned that policy considerations did not override its holding⁴⁷ and pointed out the exceptions to recovery from the initial transferee provided within the Code.⁴⁸ The court concluded by stating:

In light of the exclusions [§ 547(c)] there is no reason to use ambulatory arguments of "equity" or "policy" to defeat the Trustee's claims in this case. Congress has considered and addressed specifically the situations that most concern lenders. If these are not enough, creditors should complain to Congress.⁴⁹

Thus, the creditors of V.N. Deprizio Construction Company were held liable for transfers made within the year preceding bankruptcy, which reduced the contingent liability of insiders such as Richard N. Deprizio.⁵⁰

the court appeared to accept that its decision could result in economic inefficiency. *Id.* Nevertheless, the court argued, such inefficiency does not equate to inequity. *Id.*

⁴⁷ *Id.* at 1198. The court addressed lender contentions that the number of bankruptcy filings would increase as a result of this ruling. *Id.* The court stated that bankruptcy proceedings are not clearly more costly than workouts. *Id.* The court went on to reason that an increased number of filings does not mean an increased number of businesses ceasing operations, since many continue to operate through bankruptcy. *Id.*

⁴⁸ *Id.* at 1199. The court suggested that those exceptions will likely aid in preventing a "stampede from workouts to bankruptcies." *Id.* at 1198-99. The Court then reproduced section 547(c) which provides a comprehensive listing of those transfers which are not avoidable by the trustee. 11 U.S.C. § 547(c) (1988). Generally, that statute excepts from avoidance the following seven types of transfers:

- (1) a transfer involving a contemporaneous exchange for new value;
- (2) payment of debt incurred by the debtor in the ordinary course of its affairs and paid in the ordinary course of its affairs;
- (3) a transfer creating a purchase money security interest in collateral to the extent that the interest secures new value given;
- (4) transfer for which the creditor gave new value;
- (5) a transfer the net result of which did not benefit the creditor;
- (6) a transfer resulting from the affixing of a statutory lien not avoidable under section 545 of the Bankruptcy Code; or
- (7) in the case of an individual debtor whose debts are primarily consumer debts, a transfer affecting property having less than \$600 in value.

Id.

⁴⁹ *Levit*, 874 F.2d at 1200.

⁵⁰ *Id.* at 1200-01. The Sixth Circuit Court of Appeals recently adopted the literal approach to the interpretation of the statute. *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1495 (6th Cir. 1990). Without citing *Levit*, the court held the transferee of payments, made to reduce the contingent liability of the president of a trucking company and his mother, liable for those payments. *Id.* at 1491-92, 1495.

B. The Equitable Approach to the Issue

By their very nature, bankruptcy courts are courts of equity.⁵¹ One leading commentator strongly advocates that the court use its equitable powers to protect the initial transferee from liability. He states: "In some circumstances, a literal application of section 550(a) would permit the trustee to recover from a party who is innocent of wrongdoing and deserves protection. In such circumstances the bankruptcy court should use its equitable powers to prevent an inequitable result."⁵²

Precedent exists for such a broadly interpretative reading of the United States bankruptcy laws under the case of *Bank of Marin v. England*.⁵³ In that case, the trustee attempted to recover the amount of a check paid by the drawee after the debtor had filed for bankruptcy.⁵⁴ The Court denied recovery to the trustee⁵⁵ despite statutes which appeared to strictly dictate otherwise.⁵⁶ After referring to the statutes in question, the Court stated, "Yet we do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principals govern the exercise of bankruptcy

⁵¹ 11 U.S.C. § 105(a) (1988). Section 105(a) of the Bankruptcy Code states, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (1988); see also Note, *The Interplay Between Sections 547(b) and 550 of the Bankruptcy Code*, 89 COLUM. L. REV. 530, 536 n.32 (1989) (authored by Henk J. Brands) (explains basis of court's equitable powers).

⁵² 4 COLLIER ON BANKRUPTCY, ¶ 550.02 at 550-58 (15th ed. 1990). However, at least one other commentator does not agree with this proposition. Pitts, *Insider Guaranties and the Law of Preferences*, 55 AM. BANKR. L.J. 343, 355 (1981). He argues:

To state that this answer produces an "inequitable result" by charging a person "who is innocent of wrongdoing and deserves protection," merely assumes the conclusion either that Congress did not intend this result, or that general principles of equity as enforced by the courts will not contenance this result unless the statute unequivocally requires it.

Id.

Pitts concludes that neither assumption is justified. *Id.* He bases his conclusions upon a review of the history of bankruptcy law and criticism of "certain notorious decisions under the Act." *Id.*

⁵³ 385 U.S. 99 (1966).

⁵⁴ *Bank of Marin*, 385 U.S. at 100. The checks were drawn before the filing of the petition; however, they were presented for payment afterward. *Id.* The bank was not aware of the bankruptcy proceeding. *Id.*

⁵⁵ *Id.* at 102. The Court focused upon the fact that the drawee did not have notice of the bankruptcy and felt that it would be inequitable to hold the bank responsible for the payment due to this lack of notice. *Id.* at 102-03.

⁵⁶ *Id.* at 102. The Act stated, "[N]o transfer by or on behalf of the bankruptcy after the date of bankruptcy shall be valid against the trustee . . ." 11 U.S.C. § 110(d)(5) (1964). Also, it provided that filing of the petition operated as "an adjudication" of that fact. 11 U.S.C. § 41(f).

jurisdiction."⁵⁷

In the case of *Seely v. Church Buildings & Interiors, Inc.*,⁵⁸ the debtor, Church Buildings & Interiors (CBI) borrowed \$40,000 from Republic Bank.⁵⁹ Ninety-one days before bankruptcy, Republic released insider guarantors of the loan from their obligation in exchange for a security agreement whereby CBI granted Republic a security interest in all of its assets.⁶⁰ The court refused to hold Republic Bank liable as an initial transferee on equitable grounds.⁶¹ The court reasoned that any other result would effectively put a creditor who does not demand a guarantee in a better position than the creditor who does demand a guarantee.⁶² A substantial number of other courts have held protection of the initial transferee in this situation to be the result which equity demands.⁶³

⁵⁷ *Bank of Marin*, 385 U.S. at 103. The Court went on to say that equity demanded that the court permit recovery only from the trustee. *Id.* See generally *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868) (all statutes should be sensibly construed). However, at least one commentator contends that the statutory language here in question is completely unambiguous and that the equitable powers vested in bankruptcy courts do not extend to those courts the authority to "disregard" such language. Note, *supra* note 51, at 536-39. The commentator goes on to argue that since the Bank of Marin acted as a "mere conduit" for the funds, section 550(a)(1) and case law did not allow recovery from the bank as an initial transferee. *Id.* at 537-38. Thus, the commentator maintains that *Bank of Marin v. England* did not involve the interpretation of an unambiguous statute. *Id.* at 538.

⁵⁸ (*In re Church Bldgs. & Interiors, Inc.*), 14 Bankr. 128 (Bankr. W.D. Okla. 1981).

⁵⁹ *Id.* at 128-29.

⁶⁰ *Id.*

⁶¹ *Id.* at 131.

⁶² *Id.* The court quoted from 4 COLLIER ON BANKRUPTCY, stating:

[I]f a transfer is made to a creditor who is not an insider more than 90 days but within one year before bankruptcy and the effect is to preferentially benefit an insider-guarantor, recovery should be restricted to the guarantor and the creditor should be protected. Otherwise, a creditor who does not demand a guarantor can be better off than one who does.

Id. (quoting 4 COLLIER ON BANKRUPTCY ¶ 550.02 (15th ed. 1981)); see *supra* note 37 and accompanying text.

⁶³ See, e.g., *T.B. Westex Foods v. Alaska Continental Bank In re T.B. Westex Foods*, 96 Bankr. 77, 81 (Bankr. W.D. Tex. 1989) (bank not liable for garnishment of accounts of bankrupt corporation to satisfy default judgment against insider); *Block v. Texas Commerce Bank (In re Midwestern Cos.)* 96 Bankr. 224, 228 (Bankr. W.D. Mo. 1988) (bank not liable for payments on debt which preferred insider); *In re Aerco Metals, Inc.*, 60 Bankr. 77, 82 (Bankr. N.D. Tex. 1985) (bank not liable for preferential transfer of additional security interest which benefitted insider guarantors); *Schmitt v. Equibank (In re R.A. Beck Builder, Inc.)* 34 Bankr. 888, 894 (Bankr. W.D. Penn. 1983) (bank not liable for payments which preferred insider-guarantors); *Bakst v. Schilling (In re Cove Patio Corp.)*, 19 Bankr. 843, 844 (Bankr. S.D. Fla. 1982) (trade creditor not

In resolving the dispute over the transfers taking place before the bankruptcy of V.N. Deprizio Construction Company, the Seventh Circuit stated that equity demanded that creditors who were not the beneficiaries of insider guarantees should not be prejudiced by a reduced estate attributable to insider guarantors protecting themselves from personal liability.⁶⁴ The court also discounted the effect of the *Bank of Marin* case simply because it was decided under the former bankruptcy statutes.⁶⁵

Perhaps the strongest argument against the use of this equitable approach in the interpretation of the statute in issue comes in the form of the recent United States Supreme Court case, *Norwest Bank Worthington v. Ahlers*.⁶⁶ At least one court and one commentator have unequivocally stated that *Ahlers* serves to limit *Bank of Marin* with the following language: "[w]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."⁶⁷

Nevertheless, the respondents in *Ahlers* asked the bankruptcy court to usurp powers expressly given to creditors by the Bankruptcy Code.⁶⁸ Here, such is not the issue since section 550(a) states that a

liable for payment which benefitted insiders). See generally *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1189 n.2 (7th Cir. 1989) (court outlines cases which reject recovery on strictly equitable grounds).

⁶⁴ *Levit*, 874 F.2d at 1198.

⁶⁵ *Id.* at 1198 n.10.

⁶⁶ 485 U.S. 197 (1988).

⁶⁷ *Ahlers*, 485 U.S. at 206. The Sixth Circuit relied heavily upon this language in the case of *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1494 (6th Cir. 1990) as its reason for rejecting the equitable approach to the interpretation of the statute.

A commentator does allow that there may be two meanings given to the language of the Court in *Ahlers*. Note, *supra* note 51, at 538. The commentator states that the Court may have been speaking of either the powers of a bankruptcy court as a court of equity or "whether 'equitable powers' includes the power to give an equitable interpretation to a statute." *Id.* The commentator concludes that the court was acting to limit the power of the court to give equitable interpretation of a statute. *Id.* at 538-39. Based upon that determination, the author reasons that the equitable approach to this issue is improper. *Id.* at 539. However, the commentator fails to address the differences between the issue in *Ahlers* and in the instant situation.

⁶⁸ The respondents sought to have their reorganization plan accepted despite the fact that it had been rejected by the class of creditors entitled to make such a determination. *Ahlers*, 485 U.S. at 208. The statute in issue, 11 U.S.C. § 1126(c) (1988), plainly empowers the creditors, and not the bankruptcy court, to make such a decision by providing that "[a] class of claims has accepted a plan if such plan has been accepted by creditors" *Id.* The Court concluded that the bankruptcy court could not force the creditors to accept the plan because "the principal creditors entitled to vote in the class

trustee "may" recover the property value thereof into the estate from either the debtor or initial transferee.⁶⁹

Such permissive language is clearly commensurate with the broad powers of equity afforded bankruptcy courts. An equitable interpretation of sections 547(b) and 550(a)(1) certainly does not run afoul of an express provision of the Code as addressed by the Court in *Ahlers*. Thus, the holding of the Court in *Ahlers* should not apply to the instant situation.

C. The Two-Transfer Approach

In the case of *Goldberger v. Davis Jay Corrugated Box Corp.*,⁷⁰ the debtor, Mercon Industries, Inc. (Mercon) owed a large debt to the G.B. Goldman Paper Co. (Goldman).⁷¹ Goldman was not an insider of Mercon; however, the debts owed it by Mercon were personally guaranteed by insiders.⁷² During the year immediately preceding its bankruptcy filing, Mercon paid Goldman in excess of \$107,000 on account of the debt.⁷³

The court denied the trustee's attempt to recover the payments from Goldman despite the benefit of those payments to the insider guarantors in the form of their reduced contingent liability.⁷⁴ The court reasoned that although there had been only one transfer of funds from Mercon to Goldman, there had in effect been two transfer for purposes of analysis under the Bankruptcy Code.⁷⁵ The court cited the transfers of funds from Mercon to Goldman as one transfer and the "transfer to the guarantors in satisfaction of their contingent liability" as the other transfer.⁷⁶ The court then held the guarantors liable because of the separate transfer to them and implicitly relieved Goldman of liability by ruling that the two transfers were independent rather

of unsecured creditors (i.e., petitioners) objected to the proposed reorganization. This was their prerogative under the Code, and courts applying the Code must effectuate their decision." *Ahlers*, 405 U.S. at 208.

⁶⁹ 11 U.S.C. § 550(a) (1988) (emphasis added). Clearly, the power of the trustee and, consequently, the court to recover such a transfer from an initial transferee is permissible in nature. There is also permissive language in section 547(b), which provides that "the trustee may avoid" 11 U.S.C. 547(b) (1988) (emphasis added).

⁷⁰ (*In re Mercon Industries, Inc.*), 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

⁷¹ *Id.* at 551.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 551-52.

⁷⁵ *Id.* at 552.

⁷⁶ *Id.*

than derivative of each other.⁷⁷

Very few courts have chosen the approach taken by the court in *Goldberger*,⁷⁸ and the approach has not been well received by commentators.⁷⁹ In the bankruptcy case stemming from the financial demise of V.N. Deprizio Construction Company, the Seventh Circuit criticized this approach on the basis that the Code consistently defines "transfer" from the perspective of the debtor.⁸⁰ In that court's view, the Code does not allow the recognition of any transfers other than those made by the debtor.⁸¹ Thus, where there had only been one payment by the debtor to creditor there could accordingly be only one transfer effected.⁸²

⁷⁷ *Id.*

⁷⁸ *Levit v. Ingersoll Rand Fin. Corp.*, (*In re V.N. Deprizio Constr. Co.*), 874 F.2d 1186, 1189 n.2 (7th Cir. 1989); see, e.g., *In re Midwestern Co.*, 96 Bankr. 224, 227 (Bankr. W.D. Mo. 1988) (criticizes district court in *Levit* for viewing transfer to benefit insider guarantors as consisting of single transfer); *Deprizio*, 58 Bankr. at 480 (payment constitutes two transfers); *Mercon*, 37 Bankr. at 552 (same). Of course, support for the instant proposition found in the bankruptcy court's holding in *Deprizio* was rendered moot by the Seventh Circuit Court of Appeals holding in *Levit*. *Levit*, 874 F.2d at 1200-01.

⁷⁹ *Levit*, 874 F.2d at 1189 n.3; see, e.g., P. BLUMBERG, *THE LAW OF CORPORATE GROUPS: BANKRUPTCY LAW* § 9.03 (1988) (recovery from non-insider creditor should depend upon whether or not insider guarantor is solvent); 4 COLLIER ON BANKRUPTCY, *supra* note 52 at 550-58 (non-insider creditor not liable on equity grounds); Nutovic, *supra* note 40, at 198-99 (Code should be read literally resulting in liability for non-insider creditor); Pitts, *supra* note 52, at 344, 361 (Congress intended liability for non-insider creditor without consideration of equitable factors); Note, *supra* note 51, at 534-36. (criticizes two transfer theory as contrary to the Code's definition of transfer and requirements of § 550). *But cf.* Countryman, *The Trustee's Recovery in Preference Actions*, 3 BANKR. DEV. J. 449, 464 n.81 (1986) (citing Bankruptcy Court's holding in *Deprizio* as support for proposition that non-insider creditors should not be held liable for transfer); Katzen, *supra* note 32, at 522-23 (court's holding in *Levit* ignores two transfer problem); see also *Levit*, 874 F.2d at 1196 n.6 (two transfers are "heuristic device").

⁸⁰ *Levit*, 874 F.2d at 1195-96; see *supra* note 45 and accompanying text.

⁸¹ *Id.*

⁸² *Id.* The court went on to explain its view that the identification of multiple transfers was an "heuristic device" created by courts to explain the recovery of payments from indirect beneficiaries under the former bankruptcy laws. *Id.* at 1196. The court therefore implicitly concluded that the device was misused as a means of resolving the instant situation.

Finally, the court stated that the two transfer approach relied too heavily upon the language of section 547(b)(1) which allows avoidance of transfers made to or for the benefit of a creditor. *Id.* at 1195-96 n.6. The court reasoned that the issue here is attributable to the language of section 550(a)(1), which allows recovery of avoided transfers from either the transferee or beneficiary. *Id.* at 1196.

IV. THE APPROACH OF THE FIFTH CIRCUIT COURT OF APPEALS

In *Kellogg v. Blue Quail Energy, Inc.*⁸³ the Fifth Circuit Court of Appeals indicated its intended approach to the issue. The preferential transfer in issue was actually the grant of an additional security interest in assets of the debtor to the issuer of a letter of credit.⁸⁴ As a result of the transaction, trade debt which had been previously unsecured was in turn backed by the letter of credit.⁸⁵ Thus, the unsecured creditors effectively converted the unsecured debt to secured debt through the vehicle offered by the letter of credit.⁸⁶

While the Court held the creditors liable for the transfer,⁸⁷ it refused to hold the issuer of the letter of credit liable therefor.⁸⁸ In doing so, the court reasoned that there had actually been two transfers made

⁸³ (*In re Compton Corp.*), 831 F.2d 586 (5th Cir. 1987).

⁸⁴ *Blue Quail Energy, Inc.*, 831 F.2d at 594. Blue Quail Energy, Inc. delivered oil to Compton Corporation in March 1982. *Id.* at 588-89. Compton failed to pay for the oil on or about April 20, 1982, as was required by the agreement between the parties. *Id.* at 589. On May 6, 1982, Compton obtained an irrevocable letter of credit from MBank-Abilene in favor of Blue Quail. *Id.* The terms of the letter of credit specified that Blue Quail could draw upon it in the event that Compton failed to pay to Blue Quail the amount originally due on April 20, 1982 by June 22, 1982. *Id.* To obtain the letter of credit, Blue Quail paid MBank a fee and signed a promissory note for the amount which it might possibly owe MBank, if Blue Quail drew upon the letter of credit. *Id.*

⁸⁵ *Id.* Because of a pre-existing security agreement between Compton and MBank which contained a future advances clause, MBank also obtained a perfected security interest in the assets of Compton for the amount specified in the promissory note. *Id.*

⁸⁶ *Id.* On the day after MBank issued the letter of credit, several creditors filed an involuntary bankruptcy petition action against Compton. *Id.* On June 22, 1982, Blue Quail drew upon the letter of credit and received \$569,932.03 of the original debt of \$585,433.85 due it from Blue Quail as a result of the oil shipment in March 1982. *Id.* MBank was eventually paid on all of its secured claims against Compton's assets, including that resulting from the letter of credit for the benefit of Blue Quail. *Id.* The court held that the clear purpose of the entire transaction involving the letter of credit was to allow Blue Quail to recover an otherwise unsecured antecedent debt by means of converting it to a secured debt through the transaction. *Id.* at 594.

⁸⁷ *Id.* While Blue Quail did not become a secured party as a result of the letter of credit transaction, it benefitted from the transfer and was therefore liable for the payment of \$569,932.03 made to it by MBank. *Id.* More specifically, the court attacked the attachment of the security interest of MBank in additional assets of Compton as a result of the letter of credit transaction. *Id.*; see also *American Bank of Martin County v. Leasing Service Corp. (In re Air Conditioning, Inc.)*, 845 F.2d 293, 296-97 (11th Cir. 1988) (debtor's pledge of security interest for letter of credit may be voided as preferential transfer indirectly benefitting third party creditor).

⁸⁸ *Blue Quail Energy, Inc.*, 831 F.2d at 594. The court stated "MBank, the issuer of the letter of credit, being just an intermediary through which the preferential transfer was accomplished, completely falls out of the picture and is not involved in this particular legal proceeding." *Id.*

and that the transfer of the security interest to the issuer was not subject to attack.⁸⁹ To protect the issuer, the court relied upon a group of cases,⁹⁰ which included the case of *Goldberger v. Davis Jay Corrugated*

⁸⁹ *Id.* The court referred to this as the "Direct/Indirect Transfer Doctrine." *Id.* It therefore analyzed the granting of a security interest to MBank as a direct transfer and the indirect benefit to Blue Quail of having its unsecured claim suddenly become secured as another transfer. *Id.* The court then reasoned that MBank could not be held liable for the value of the collateral for either of two reasons. *Id.* at 591. First, MBank had given new value in return for the additional security interest, and Section 547(e)(3) excepts such payments from a avoidance as a preference. *Id.* Alternatively, because the date of the transfer related back to the perfection of the security interest created by the security agreement containing the future advances clause, it was well outside of the ninety day preference period applicable to MBank as a non-insider as dictated by section 547(b)(4) of the Code. *Id.*

⁹⁰ *Id.* at 591-94; see *National Bank of Newport v. National Herkimer County Bank*, 225 U.S. 178, 184 (1912) (focuses upon effect of transfer); *Sommers v. Burton*, (*In re Conard Corp.*) 806 F.2d 610, 612 (5th Cir. 1986) (creditors not allowed to receive payments from transferee of debtor under assumption of debt agreement); *Katz v. First Nat'l Bank*, 568 F.2d 964, 969 n.4 (2d Cir. 1977) (Bankruptcy Act definition is to be broadly read and is intended to preclude circumvention), *cert. denied*, 434 U.S. 1069 (1978); *Palmer v. Radio Corp. of Am.*, 453 F.2d 1133, 1156 (5th Cir. 1971) (payment by transferee of television station of less than fair market value for assets because of assumption of liabilities resulted in preferential transfer to unsecured creditor to whom debts were owed); *Virginia Nat'l Bank v. Woodson*, 329 F.2d 836, 839 (4th Cir. 1964) (bank which received \$8,000 in satisfaction of overdrafts forced to return money because debtor obtained money by pledging stock to obtain loan); *Aulick v. Largent*, 295 F.2d 41, 52 (4th Cir. 1961) (endorsement of note by third party in return for collateral resulted in preferential transfer to holder of note); *Goldberger v. Davis Jay Corrugated Box Corp.*, (*In re Mercon Indus., Inc.*), 37 Bankr. 549, 552 (Bankr. E.D. Penn. 1984) (payment of non-insider creditor within one year of bankruptcy constituted preference to insider guarantors).

With the exception of *Sommers* and *Goldberger*, all of the cases cited by the Fifth Circuit were decided under previous bankruptcy laws, specifically the Bankruptcy Act of 1898 (hereinafter referred to as the "Act"). Under the Act, all types of creditors were subject to a preference period of four months preceding the transfer. *Nutovic*, *supra* note 40, at 186. Thus, because of the same preference period being applicable to both, the issue addressed herein could not have arisen. *Pitts*, *supra* note 52, at 348. However, a similar issue did exist. *Id.* Where transfers had been made for the benefit of guarantors, they were recoverable from the guarantors, but not from the initial transferee. *Id.* at 348-49. This was because subsequent to amendment in 1938, the Act allowed recovery only from a party which had "reasonable cause to believe the debtor was insolvent." Act of June 22, 1938, ch. 575, 52 Stat. 840 (repealed by Pub. L. No. 95-598, 92 Stat. 2549 (1978)). Thus, from 1838 to 1978, recovery was not allowed from the creditor who received the transfer unless it was proven that the creditor had "reasonable cause to believe the debtor was insolvent." *Pitts*, *supra* note 52, at 350-51.

The "reasonable cause to believe" requirement can easily be seen as a basis for the "Direct/Indirect" or Two Transfer Doctrine since each transfer effected had to be examined for purposes of determining whether or not the creditor had such cause. In view

*Box Corp.*⁹¹ Despite the court's reliance upon it in *Blue Quail, Inc.*, *Goldberger* differed from *Blue Quail, Inc.* in a substantial fashion.⁹² Unlike the initial transferee of the security interest in *Blue Quail, Inc.*,⁹³ the initial transferee in *Goldberger* had given no new value for the payments it received.⁹⁴ Instead, the transferee had benefitted from payments made to reduce the liability of insiders of the debtor corporation who had guaranteed the loan.⁹⁵

While the Fifth Circuit Court of Appeals did not directly rule on this issue,⁹⁶ it did appear to give its approval to the approach of the court in *Goldberger* with its citation as support for the position taken by the Court in *Blue Quail, Inc.*⁹⁷

Thus, the Fifth Circuit Court of Appeals appears poised to adopt the reasoning of the court in *Goldberger*, when it is presented with a factual scenario similar to that surrounding the bankruptcy of V.N. Deprizio Construction Company.

V. CONCLUSION

Simply put, the reliance of the Fifth Circuit upon the two-transfer approach ignores the clear language of the Bankruptcy Code. As stated by the Seventh Circuit in *Levit v. Ingersoll Rand Financial Corp.*⁹⁸, the approach is based upon an incorrect definition of "transfer."⁹⁹

of the absence of such language in the Bankruptcy Code, reliance upon cases decided under the Act as support for the doctrine is inappropriate.

⁹¹ *Blue Quail Energy, Inc.*, 831 F.2d at 593-94. The court relied upon *Mercon* for further support of its interpretation of the Code which defined a transfer for the benefit of someone other than the initial transferee to have actually been comprised of two transfers. *Id.*

⁹² See *supra* notes 70-73 and accompanying text.

⁹³ *Blue Quail Energy, Inc.*, 831 F.2d at 594. The court, regarding the initial transferee (MBank) in that case stated, "MBank did not receive any preferential transfer-it gave new value for the security interest." *Id.*

⁹⁴ See *supra* note 73 and accompanying text.

⁹⁵ See *supra* note 74 and accompanying text.

⁹⁶ *Blue Quail Energy, Inc.*, 831 F.2d at 593-94. While the court recognized *Goldberger* presented a different factual scenario than that addressed in *Blue Quail Energy, Inc.*, the court cited *Goldberger* as support for the "Direct/Indirect Transfer Doctrine." *Id.*

⁹⁷ *Id.* The court also cited the bankruptcy court's holding in *In re V.N. Deprizio Const. Co.*, 58 Bankr. 478 (Bankr. N.D. Ill. E.D. 1986), *rev'd sub nom.*, *Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545 (N.D. Ill. 1988), *aff'd*, 874 F.2d 1186 (7th Cir. 1989) as support for the "Direct/Indirect Transfer Doctrine." *Blue Quail Energy, Inc.*, 831 F.2d at 594 n.9.

⁹⁸ *Deprizio*, 874 F.2d at 1186.

⁹⁹ See *supra* notes 45, 80-82, 90 and accompanying text.

Nevertheless, in its apparent approach, the Fifth Circuit correctly refuses to ignore the equitable considerations attendant to holding a non-insider transferee liable for payments made to benefit an insider for the period applicable to insiders.¹⁰⁰ In creating two different preference periods, Congress clearly intended that insiders not unjustly profit from their position by using inside information to protect themselves to the detriment of non-insider creditors.¹⁰¹ Subjecting an innocent transferee to the extended preference period makes that transferee a victim of the very device intended to protect them.¹⁰²

The decision of the United States Supreme Court in *Bank of Marin v. England*¹⁰³ supports a broadly interpretive reading of the Code and consideration of the equitable circumstances surrounding a bankruptcy case.¹⁰⁴ Any argument that the equitable powers of the court to interpret the Code were somehow limited by the United States Supreme Court in *Norwest Bank Worthington v. Ahlers*¹⁰⁵ may be answered by an examination of the facts in the *Ahlers* case.¹⁰⁶ In *Ahlers*, the petitioners argued that the bankruptcy court could override the statutory power of the creditors' committee to reject a reorganization plan.¹⁰⁷ In the instant situation, the issue is the court's interpretation of the word "may" in connection with the trustee's recovery powers under section 550(a) of the Code.¹⁰⁸ Clearly, such a word is permissive in nature and provides the court with the opportunity to use its equitable powers to prevent an unjust result.¹⁰⁹ Accordingly, the Fifth Circuit should adopt the reasoning of the court in the case of *Seely v. Church Buildings & Interiors, Inc.*¹¹⁰

Despite the argument of the court in *Levit*, a "literal" reading of the statutes may in fact ignore the intent of Congress in enacting a statute containing two different preference periods.¹¹¹ Moreover, the grant of discretion to the trustee and, in turn, the Bankruptcy Court in

¹⁰⁰ See *supra* note 52 and accompanying text.

¹⁰¹ See Katzen, *supra* note 32, at 513 (insiders could often prefer their own claims without extended preference period).

¹⁰² *Id.*

¹⁰³ 385 U.S. 99 (1966).

¹⁰⁴ See *supra* notes 53-57 and accompanying text.

¹⁰⁵ 485 U.S. 197 (1988).

¹⁰⁶ See *supra* notes 67-68 and accompanying text.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *In re Church Bldgs. & Interiors, Inc.*, 14 Bankr. 128 (Bankr. W.D. Okla. 1981); see *supra* notes 58-63 and accompanying text.

¹¹¹ See *supra* note 49 and accompanying text.

deciding from whom to effect recovery of a preferential transfer reflects the reality that the question of initial transferee liability merits "a facts and circumstances" analysis.¹¹²

Thus, the Fifth Circuit Court of Appeals should not attempt to fashion a new definition of "transfer" or rely upon a mechanistic reading of the Code. It should instead rely upon the statutes as written and allow bankruptcy courts their equitable powers to hold non-insider transferees liable for the extended preference period only where appropriate in light of their actions.

Charles Louis McBride, Jr.

¹¹² See *supra* note 52 and accompanying text.

MODERN REMEDIES FOR OPPRESSION IN THE CLOSELY HELD CORPORATION

I. INTRODUCTION

The minority shareholder in a closely held corporation is in a very vulnerable position. Traditional corporate law allows the majority shareholder wide latitude in "freezing out" or otherwise "oppressing" the minority by such actions as withholding dividends or salaries, and refusing to allow the minority to participate in managing the corporation.¹ Relying on the "business judgment rule,"² and the notion of "majority rule,"³ courts in the past have, in effect, allowed the majority to use the minority's investment without paying for it.⁴ Professor F. Hodge O'Neal, perhaps the leading authority on close corporations, considers unfair treatment of minority shareholders by those in control to be so widespread as to constitute a "national business scandal." The amount of litigation resulting from minority shareholder oppression has grown tremendously in recent years, and such litigation shows no sign of abating.⁵

This comment will attempt to trace the current judicial and statutory trend toward the recognition of the unique needs of the minority interest in the close corporation. More particularly, this comment will

¹ See, e.g., Olson, *A Statutory Elixir for the Oppression Malady*, 36 MERCER L. REV. 627, 627 (1985) (discussing protection offered to minority shareholders under new Minnesota statute).

² This rule immunizes management from liability in corporate transaction undertaken within both power of corporation and authority of management where there is reasonable basis to indicate that transaction was made in good faith. BLACK'S LAW DICTIONARY 181 (5th ed. 1979).

³ See generally Note, *Involuntary Dissolution of Close Corporations for Mistreatment of Minority Shareholders*, 60 WASH. U.L.Q. 1119, 1149 (1982) (authored by Linda L. Shapiro) (stating that since principle of majority rule assumes that minority shareholder by purchasing less than majority interest, surrenders control of his investment to majority, then such rule conflicts with realities of close corporations because most shareholders expect to participate in corporate management).

⁴ See Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibility*, 22 WAKE FOREST L. REV. 9, 21 (1987) (arguing that fiduciary obligations are rooted in expectations of parties).

⁵ O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 121 (1986-87). Furthermore, many of these shareholder disputes are not reflected by case law nor statute since many disputes of this nature result in settlements. *Id.* at 122.

examine the recent attempts by courts and legislatures to define the term "oppression" through use of the "reasonable expectations" standard and the acceptance of an enhanced "fiduciary duty" doctrine between the majority and minority stockholders. Finally, the focus of this comment will be on the historically harsh remedy of dissolution and the current attempts by courts and legislatures to provide equitable alternatives to aggrieved shareholders.

II. THE UNIQUENESS OF THE CLOSELY HELD CORPORATION

In 1893 a prominent Eastern newspaperman was asked: "Sir, what are the shares of your company worth?" His reply, "There are 51 shares that are worth \$250,000. There are 49 shares that are not worth a ----,"⁶ Almost a century later, the central truth of this old story has not diminished: that the minority shareholders of close corporations, unlike those of publicly held corporations, are often "squeezed in a vise of illiquidity."⁷ This illiquidity is due to the absence of a public market and thus the absence of market value for the company's stock, which is one of the leading characteristics of a closely held corporation.⁸ Hence, the minority interest in closely held corporations is in substantial risk of the conduct of the majority,⁹ without the protection of the exit option offered to shareholders in publicly held corporations by the securities market.¹⁰

⁶ *Humphreys v. Winous Co.*, 165 Ohio St. 45, 133 N.E.2d 780, 783 (1956) (quoting from Judge John H. Doyle's address of Ohio State Bar in 1893).

⁷ Wells, *Involuntary Dissolution as a Remedy for Freeze-Outs of Minority Shareholders: Two West Virginia Statutes*, 88 W. VA. L. REV. 47, 47-48 (1985) (comparing West Virginia's two dissolution statutes and offering methods of escape from "the illiquidity vise").

⁸ *Id.* at 48; see F. O'Neal & R. Thompson, O'NEAL'S CLOSE CORPORATIONS § 1.02 (3d ed. 1986) (treatise using term "close corporation" to mean one whose shares are not generally traded in securities market) [hereinafter O'NEAL & THOMPSON]; HETHERINGTON, *supra* note 4, at 21 (discussing absence of market for closely held stock).

⁹ See Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1 (1977) which says:

[T]he terms "majority" and "minority" are used to distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not. Although control is not often determined by the size of shareholdings, it does not depend upon 51% ownership. For example, control might be exercised by a non-majority shareholder who has special skills upon which the business depends.

Id. at 5 n.7.

¹⁰ Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U.L.Q. 193, 237 (1988) (discussing risk facing minority shareholders and recent

This is a particularly unique and dangerous position for the minority shareholder because in no other form of business organization do the owners face the potential of complete loss of their investment's liquidity and an indefinite exclusion from profits.¹¹

It is *only* in the closely held corporation that the noncontrolling investor can find himself "locked in" to an enterprise from which he may receive no earnings and which may allow him no voice in management and operation. The minority's capital is, in effect, "held hostage to the generosity of those in control of the corporation."¹²

Although most commentators agree that the term "close corporation" refers to a corporation whose shares are not generally traded on the securities market, beyond that the definition varies.¹³ Another aspect of close corporations is typically a small number of shareholders¹⁴ who also manage the corporation.¹⁵ This leads to a highly personal bus-

legislative and judicial changes recognizing different needs of close corporations).

¹¹ See Comment, *The Strict Good Faith Standard - Fiduciary Duties to Minority Shareholders in Close Corporations*, 33 MERCER L. REV. 595, 596 (1982) (discussing potential abuses of minority because of majority's stronger position).

¹² OLSON, *supra* note 1, at 628 (stating that majority, in effect, gives minority a "worthless I.O.U.").

¹³ O'NEAL & THOMPSON, *supra* note 8, at § 1.07. Professor O'Neal states that the following are typical attributes of the close corporation:

(1) the shareholders are few in number, often only two or three; (2) they usually live in the same geographical area, know each other, and are well-acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and 4) there is no established market for the corporate stock, the shares not being listed on a stock exchange or activity dealt in by brokers; little or no trading takes place in the shares.

Id., § 1.07, at 24. Israel, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488, 491 (1948) (pointing out that no all-purpose definition of close corporation has ever been worked out); Note, *Corporation Law - Meiselman v. Meiselman: "Reasonable Expectations" Determine Minority Shareholders' Rights*, 62 N.C.L. REV. 999, 1003 (1984) (authored by Christopher Blair Capel) (defining close corporation is no simple task).

¹⁴ See O'NEAL & THOMPSON, *supra* note 8, § 1.15, at 77. Many states' statutory close corporation definitions are based in part on having less than a certain number of shareholders, for example: ARIZ. REV. STAT. ANN. § 10-203 (1990) (10 original investors); MINN. STAT. ANN. § 302A.011(6a) (West 1985) (35 shareholder maximum); ME. REV. STAT. ANN. tit. 13-A, § 102 (1981) (20 shareholder maximum); WIS. STAT. ANN. § 180.995 (West Supp. 1989) (50 shareholder maximum). The MODEL STATUTORY CLOSE CORPORATION SUPPLEMENT, § 3(b), sets a limit of 50 or fewer shareholders for a corporation desiring to amend its articles and elect close corporation status. 4 MODEL BUSINESS CORPORATION ACT ANN. § 3(b) at 1810 (Harcourt Brace Jovanovic 3d ed. 1985).

¹⁵ See generally O'NEAL & THOMPSON, *supra* note 8, § 1.02, at 3 (most significant characteristic of many corporations with few shareholders is that "management and ownership are substantially identical").

iness relationship among the manager-owners similar to a partnership.¹⁶ Accordingly, subject to these broad definitions, the great majority of incorporated enterprises in this country can be classified as close corporations.¹⁷

It follows then, that the expectations of the investor in a close corporation are quite different from those of the investor in a publicly held company. Whereas the investor in publicly held stock is probably seeking only a return on his investment and has only a passive interest in the day-to-day operation of the company, the closely held investor ordinarily takes an active interest in the management of the business and depends on it to be the principal source of his livelihood.¹⁸

A. "Oppression" Statutes and the Shareholder's Reasonable Expectations

Most American courts permit an aggrieved shareholder to petition for dissolution of a corporation on grounds which involve misconduct by those in control, *i.e.*, illegality, fraud, and waste of assets.¹⁹ However, the modern legislative and judicial trend focuses on the impact of the acts by the majority on the minority shareholder, rather than the traditional approach of searching for misconduct by those in control.²⁰

¹⁶ *Id.*; see Note, *supra* note 13, at 1003 (contrasting business relationships between public and close corporations). In a landmark decision, the Supreme Judicial Court of Massachusetts determined that a corporation was closely held if it had (1) a small number of shareholders, (2) no ready market for its stock, and (3) substantial majority shareholder participation in the operation of the enterprise. *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578, 328 N.E.2d 505, 515 (1975). Further, the *Donahue* court recognized the similarity between a close corporation and a partnership while holding that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another." *Donahue*, 328 N.E.2d at 515. See also *Fought v. Morris*, 543 So. 2d 167, 171 (Miss. 1989) (adopting *Donahue* standard by stating that "stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships").

¹⁷ See O'NEAL & THOMPSON, *supra* note 8, § 1.02, at 3 (comparing wide array of attempted definitions of close corporations). One estimate determined that 95% of all corporations have 10 or fewer shareholders. Conrad, *The Corporate Census: A Preliminary Exploration*, 63 CALIF. L. REV. 440, 458-59 (1975).

¹⁸ See Comment, *supra* note 11, at 595.

¹⁹ See generally O'NEAL & THOMPSON, *supra* note 8, § 9.29, at 131 (discussing broad statutory grounds of relief for oppressive or similar conduct); REV. MODEL BUS. CORP. ACT § 14.30(2)(ii), (iv) (misapplication of assets, waste, fraud, or illegality are grounds for dissolution).

²⁰ See F. O'NEAL & R. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 7:20, at 149 (2d ed. 1985) (requesting protection of minority shareholder's reasonable expectations) [hereinafter OPPRESSION].

This trend is reflected by the inclusion of "oppression" in most state statutes²¹ as a ground for involuntary dissolution.²² This inclusion of "oppression" and other similar grounds has opened up a "much broader avenue of relief" for minorities locked into close corporations.²³ Most courts have interpreted the term of oppression broadly, recognizing the term as a legislative response to the distinctive needs of close corporations.²⁴ Therefore, oppression does not necessarily infer fraud or imminent disaster.²⁵

In defining oppression, the leading judicial view adopts "disappointment of reasonable expectations" as the best guide.²⁶ Professor O'Neal strongly advocated a "reasonable expectation" standard for determining proper judicial treatment for dissatisfied minority shareholders in the first edition of *Oppression of Minority Shareholders* in 1975.²⁷

In perhaps the strongest decision adopting the reasonable expectations doctrine, *Meiselman v. Meiselman*,²⁸ the North Carolina Supreme Court stated:

²¹ See, e.g., MISS. CODE ANN. § 79-4-14.30(2)(ii) (Supp. 1990) (authorizing judicial dissolution in proceeding by shareholder when those in control of corporation act in manner that is illegal, oppressive, or fraudulent); REV. MODEL BUS. CORP. ACT § 14.30(2)(ii) (same).

²² See O'NEAL & THOMPSON, *supra* note 8, § 9.29, at 131 (discussing various states' dissolution statutes); Thompson, *supra* note 10, at 206 (stating that 37 states now include oppression or similar term in their corporation statutes).

²³ O'NEAL AND THOMPSON, *supra* note 8, § 9.29, at 132.

²⁴ See, e.g., *In re Application of Rambusch*, 533 N.Y.S.2d 423, 424-25 (1988) ("oppression" is conduct that substantially defeats "reasonable expectations" held by minority shareholders); *Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987) (oppression is expansive term used to cover various situations dealing with conduct which is neither illegal nor fraudulent). See generally Thompson, *supra* note 10, at 209 (stating that American courts have not adopted narrow approach to oppressive conduct, recognizing distinctive problems of close corporations).

²⁵ See *Giannotti v. Hamway*, 239 Va. 14, 387 S.E.2d 725, 730-31 (1990) ("oppressive" does not mean imminent corporate disaster or fraudulent conduct); *Compton v. Paul K. Harding Realty*, 6 Ill. App. 3d 488, 285 N.E.2d 574, 581 (1972) (oppression is not synonymous with "illegal" and "fraudulent" conduct by majority).

²⁶ See, e.g., *In re Kemp & Beatley, Inc.*, 64 N.Y. 2d 63, 72-73, 484 N.Y.S.2d 799, 805, 473 N.E.2d 1173, 1179 (1984) (utilizing shareholder's reasonable expectations to identify and measure alleged oppressive conduct); *Stefano v. Coppock*, 705 P.2d 443, 446 n.3 (1985) (adopting reasonable expectation standard expressed in *Kemp & Beatley*).

²⁷ F. O'NEAL, *OPPRESSION OF MINORITY SHAREHOLDERS*, at 525 (1975) (stating that reasonable expectations as they exist at inception of enterprise, and develop through course of dealing, is most reliable guide to just solution in shareholder disputes in typical close corporation).

²⁸ 309 N.C. 279, 307 S.E.2d 551 (1983).

These "reasonable expectations" are to be ascertained by examining the entire history of the participants' relationship. That history will include the "reasonable expectations" created at the inception of the participants' relationship; those "reasonable expectations" as altered over time; and the "reasonable expectations" which develop as the participants engage in a course of dealing in conducting the affairs of the corporation In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not "reasonable".²⁹

This decision announced a four-part test used to determine a complaining shareholder's reasonable expectations. However, before this test can be applied, a court must be able to articulate specifically the individual's "rights or interests"³⁰ as a minority shareholder in a close corporation and then determine if these "rights or interests" need protection.³¹ After this initial determination, the plaintiff must prove:

- (1) [H]e had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault

²⁹ *Meiselman*, 307 S.E.2d at 563. In *Meiselman*, a brother holding a minority interest in a family corporation sought dissolution or a buy-out of his shares in connection with being fired by his younger brother. *Id.* at 554. The North Carolina Supreme Court concluded that the trial court applied an erroneous legal standard in failing to provide relief, and remanded with orders to focus on the "rights or interests" of the complaining shareholder instead of the "bad faith" or "gross abuse" of the majority. *Id.* at 567.

³⁰ *Id.* at 562-63. The "rights or interests" of a particular shareholder are not necessarily the same "rights or interests" of any other shareholder. *Id.* at 563. Articulating these "rights or interests" requires a case-by-case determination based on the entire history of the participant's relationship including new and altered expectations developing "over the course of the participants' cooperative efforts in operating the business." *Id.*

³¹ *Id.* The minority shareholder claimed that the particular "rights or interests" he had in the close corporation indeed secure employment, fringe benefits, and active participation in the management of the business. *Id.* at 564-65. The protection of these "rights or interests" was needed since the minority shareholder was fired from his job, severed from his fringe benefits, and systematically excluded from management. *Id.* at 565. The defendants argued that the minority shareholder was only entitled to relief if his "traditional" shareholder rights had been arranged: right to notice of stockholders' meetings; right to vote cumulatively; right to access of corporate offices and financial information; and right to compel payment of dividends. *Id.* The court disagreed with the defendants' argument while stating that "a shareholder's rights in a closely held corporation may not necessarily be so narrowly defined." *Id.*

of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case plaintiff is entitled to some form of equitable relief.³²

The *Meiselman* court's focus on the harm to the minority shareholder as opposed to the traditional focus on wrongdoing by those in control reflects the current trend of recognizing the special nature of close corporations. *Meiselman* offered a broader ground for relief to the aggrieved minority shareholder by way of a liberal interpretation of the "reasonable expectations" doctrine.³³

Furthermore, O'Neal points out that the reasonable expectations of closely held shareholders are generally not contained in any written shareholder agreement and are often in the form of "half-articulated understandings."³⁴ Hence, they must be objectively viewed, and the frustration of subjective hopes should not trigger relief.³⁵ The lack of a written shareholder agreement concerning future disputes is to be expected, however, because the mutual trust among shareholders at the inception of the closely held corporation prevents much focus on the "downside."³⁶ This is precisely the purpose of "oppression" statutes

³² *Id.* at 564.

³³ See Thompson, *supra* note 10, at 215 (discussing significance of *Meiselman* and its focus on "rights or interests" of minority shareholders); see also *O'Donnell v. Marine-Repair Services, Inc.*, 530 F. Supp. 1199, 1207 (S.D.N.Y. 1982) (minority shareholder's reasonable expectations frustrated by his expulsion although he became partner one year after formation of company); *In re Wiedy's Furniture Clearance Center*, 108 App. Div. 2d 81, 487 N.Y.S.2d 901, 903 (1985) (discharging plaintiff from family corporation oppressive because plaintiff returned to family business with reasonable expectation of being actively involved in management); *Fox v. 7L Bar Ranch*, 198 Mont. 201, 214, 645 P.2d 929, 936 (1982) (plaintiff had reasonable expectation of sharing in his father's inheritance); cf. *Masinter v. WEBCO Co.*, 164 W. Va. 241, 262 S.E.2d 433, 442 (1980) (relief denied to minority shareholder because no wrongful denial of legitimate expectation found in mere procedural irregularity of corporate meetings). But see *Capital Toyota v. Gervin*, 381 So. 2d 1038, 1039 (Miss. 1980) (citing *Exadaktilos* and pointing out that complaining party's reasonable expectations had been thwarted, but not grossly so). *Exadaktilos v. Cinnaminson Realty*, 167 N.J. Super. 141, 400 A.2d 554, 562 (1979) (plaintiff's expectation of participating in business thwarted by his failure to satisfy condition precedent - that he learn business); see generally Note, *supra* note 13, at 1015 (arguing that reasonable expectations test falls short of relieving all minority shareholders suffering from freeze-out and suggesting even further expansion of test).

³⁴ See OPPRESSION, *supra* note 20, § 7.20, at 149 (stating that full business bargain of participants in close corporation is often oral).

³⁵ *Id.*; see also O'NEAL & THOMPSON, *supra* note 9, § 9.30, at 143 (expectations must be gleaned from parties' actions as well as signed agreements); Note, *supra* note 13, at 1010 (stating that absence of written agreement leads to majority domination and possible minority freeze-out).

³⁶ See Thompson, *supra* note 7, at 224 (noting that such disputes do not easily lend

and the "reasonable expectations" doctrine - to resolve conflicts unlikely to be the subject of advance planning.³⁷

The doctrine of "disappointment of reasonable expectations" as a basis for aggrieved minority shareholder relief is a relatively new concept, with court decisions dating only from about 1980.³⁸ However, the courts' accelerated usage of the "reasonable expectations" standard along with inclusion of "oppression" in an increasing number of state statutes, undoubtedly has lowered the threshold at which courts will provide relief to minority shareholders.³⁹

B. A Heightened Standard of Fiduciary Duty

It has long been a rule of corporate law that the directors and officers of a corporation owe a fiduciary duty to the corporation they serve. However, until recently, courts have been reluctant to recognize that a fiduciary duty is owed by the majority to the minority stockholders. This recognition stems from the courts enlightened attitudes concerning the different needs of the minority shareholders in close corporations as compared to their counterparts in public corporations.⁴⁰

As an appropriate complement to the "reasonable expectations" doctrine, the *Meiselman* court stated that the majority owed a fiduciary duty to the minority.⁴¹ Breach of this fiduciary duty doctrine has also been applied as a definition of oppression⁴² and was first enunciated in the now famous case of *Donahue v. Rodd Electrotype*.⁴³ In *Donahue*, the Supreme Judicial Court of Massachusetts articulated a new standard of fiduciary duty: "[All] stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe one another . . . the 'utmost good faith and loyalty.'"⁴⁴ This general recognition of the simi-

themselves to advance planning).

³⁷ *Id.* at 226.

³⁸ See Clifford, *Close Corporation Shareholder Reasonable Expectations: The Larger Context*, 22 WAKE FOREST L. REV. 41, 41 n.2 (1987) (attempting to clarify contours of doctrine of disappointment of reasonable expectations).

³⁹ O'NEAL & THOMPSON, *supra* note 8, § 9.29, at 135.

⁴⁰ Comment, *supra* note 11, at 597-98.

⁴¹ Note, *supra* note 13, at 1020.

⁴² See *Kisner v. Coffey*, 418 So. 2d 58, 61 (Miss. 1982) (stating that "oppressive" conduct by those in control of close corporation is closely related to fiduciary duty of good faith and fair dealing owed by majority to minority stockholders).

⁴³ 367 Mass. 578, 328 N.E.2d 505 (1975).

⁴⁴ *Donahue*, at 593, 328 N.E.2d at 515. In *Donahue*, controlling shareholders refused

larity between partnerships and closely held corporations relieved the "identity crisis" suffered by minority shareholders in close corporations.⁴⁶ The court distinguished the minority shareholder in the close corporation from the shareholders in a publicly held company by imposing this higher degree of fiduciary duty upon the controlling shareholders in a closely held corporation.⁴⁶

The *Donahue* court seemed to abandon the traditional considerations of "majority control"⁴⁷ and the "business judgment rule,"⁴⁸ replacing them with what has been termed the "equal opportunity rule," which provides that if the majority confers any benefit on themselves, they must confer the same benefit on the minority.⁴⁹ This heightened fiduciary duty was justified in close corporations because of the great vulnerability of the minority to abuse by the majority. In a close corporation, the majority's enormous power to "squeeze out" the minority by refusing to declare dividends or by paying themselves enormous salaries, was much greater than their counterparts' power in the public corporation.⁵⁰

However, the Supreme Judicial Court of Massachusetts in *Wilkes v. Springside Nursing Home*⁵¹ retreated from its broad imposition of the strict fiduciary duty standard formulated in *Donahue* by narrowing the scope of the "equal opportunity" aspect of the case.⁵² The *Wilkes* decision attempted to define more carefully the duty owed to the minority by the majority. The court recognized that the majority must be

to buy minority shareholders' stock although an offer had been made to buy the founder's stock. The court held that failure to confer equal benefits in proportion to stock owned was a breach of the corporation's fiduciary duty to its minority shareholders. *Id.* The Mississippi Supreme Court adopted the *Donahue* standard in *Fought v. Morris*, where it held that "stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships." 543 So. 2d 167, 171 (Miss. 1989).

⁴⁶ See Olson, *supra* note 1, at 649 (stating that every court in past 16 years has adopted this standard when considering relationship among shareholders in closely held corporations, and that *Donahue* standard is universally recognized common law in America).

⁴⁷ See Comment, *supra* note 11, at 600-01 (pointing out various reasons for significance of *Donahue*).

⁴⁸ See *supra*, note 3.

⁴⁹ See *supra*, note 2.

⁵⁰ *Donahue*, 328 N.E.2d at 518.

⁵¹ *Id.* at 514-17; see also Comment, *supra* note 11, at 600 (comparing similarities of membership in close corporation with membership in partnership).

⁵² 370 Mass. 842, 353 N.E.2d 657 (1976).

⁵³ *Wilkes*, 353 N.E.2d at 663; see also Comment, *supra* note 11, at 602 (discussing, *Wilkes* inquiry into a legitimate business purpose of majority).

accorded some flexibility in operating the company because it had a right to maximize efficiency of corporate resources:

[W]e are concerned that untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned.⁵³

The *Wilkes* court developed a "balancing test" to determine whose interest should prevail. Under this test, the initial burden is placed upon the majority to demonstrate a "legitimate business purpose" for taking actions harmful to the minority. If this burden is met, the minority then must prove how this corporate purpose could have been accomplished through some alternative, less harmful means. Once this is accomplished, the court must weigh the "legitimate business purpose" against the practicality of the minority's less harmful alternative.⁵⁴

It is important to point out that these different standards for oppression do not contradict one another because conduct violating one will most likely violate another. For instance, a breach of the majority's fiduciary duty will also be considered a departure from the standards of fair dealing and also frustrate a shareholder's reasonable expectations.⁵⁵ Therefore, it would be appropriate to include within the minority's "reasonable expectations" a fiduciary duty owed to them by the majority.⁵⁶ Therefore, in those jurisdictions with narrow, technical in-

⁵³ *Wilkes*, 353 N.E.2d at 663. In *Wilkes*, the plaintiff was a victim of a "squeeze-out" attempt when the other shareholders terminated his employment and ousted him as an officer and director after the relationship among them had deteriorated. *Id.* at 661.

⁵⁴ *Id.*; see *Orchard v. Covelli*, 590 F. Supp. 1548, 1556 (W.D. Pa. 1984) (where majority interest stands to benefit, majority's action must be "intrinsically fair" to minority), *aff'd*, 802 F.2d 448 (3d Cir. 1986); *Fought v. Morris*, 543 So. 2d 167, 171 (Miss. 1989) (recognizing evolving awareness by courts of distinctive characteristics of close corporations by adopting *Orchard* "intrinsically fair" test and requiring "same relationship of trust and confidence which prevails in partnerships"); *Crosby v. Beam*, 47 Ohio St. 3d 105, 107-10, 548 N.E.2d 217, 220-21 (1989) (discussing *Donahue* and *Wilkes* and recognizing breach of heightened fiduciary duties where there was no legitimate business purpose); *Bullock, Heightened Fiduciary Duties in Closely Held Corporation: Donahue Revisited*, 16 PAC. L.J. 935, 941-42 (tracing impact of *Donahue* and calling for its extension). See generally O'NEAL & THOMPSON, *supra* note 8, § 8.08, at 76-77 (discussing development of fiduciary duty standard and effect of *Wilkes*).

⁵⁵ O'NEAL & THOMPSON, *supra* note 8, § 9.29, at 132-33.

⁵⁶ See Note, *supra* note 13, at 1022 (arguing that minority's reasonable expectations should include fiduciary duty owed to minority by majority).

terpretations of oppression statutes and "reasonable expectations", the minority could argue the "enhanced fiduciary duty" doctrine on broad considerations of corporate duty and loyalty when the acts of oppression by the majority do not satisfy statutory requirements.⁵⁷

III. REMEDIES

A. *Involuntary Dissolution*

Initially courts rejected the idea that they had the power to dissolve a corporation at the petition of its shareholders. The rationale for such a position was the fact that corporations were entities created by the state and courts were unwilling to dissolve that which the sovereign had created absent express authority.⁵⁸ This traditional rule has been "eaten up" by exceptions,⁵⁹ and today every state has a statute authorizing involuntary dissolution under certain circumstances.⁶⁰ The most prevalent type of dissolution statute follows section 14.30 of the *Model Business Corporation Act*, which establishes liabilities in three types of situations: 1) director or shareholder deadlock, 2) waste or misapplication of corporate assets, and 3) fraudulent, illegal, or oppressive conduct.⁶¹ However, some of these statutes are so narrowly drawn and/or judicially interpreted that they are virtually useless in solving problems

⁵⁷ See Thompson, *supra* note 10, at 209 (stating that American courts have for most part not adopted narrow view of oppression); O'Neal, *supra* note 3, at 141 (noting that fiduciary duty principles provide opportunity for minority shareholders to move case from narrow technical grounds, where majority's action may be unattackable, to broad considerations of corporate duty and loyalty).

⁵⁸ See generally Comment, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies*, 47 Miss. L.J. 476, 494-95 (1976) (tracing development of courts' use of equitable powers in fashioning remedies for oppressed minority shareholders).

⁵⁹ See, e.g., OPPRESSION, *supra* note 20, § 10:05, at 21 (stating that question is no longer whether courts have jurisdiction or power to dissolve corporation, but real question is whether courts will exercise their power in particular cases).

⁶⁰ See Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 31-32 (1986-87) (contrasting various states' dissolution statutes and stating that courts have generally followed strict construction of the statutes in recognition of drastic effects of dissolution); O'NEAL & THOMPSON, *supra* note 8, § 9.29, at 131-35 (thorough discussion of various dissolution statutes); Note, *supra* note 13, at 1006 (stating that today virtually every state authorizes dissolution as remedy for minority shareholders as result of recognition of unique problems of close corporations).

⁶¹ HAYNSWORTH, *supra* note 60, at 33. Thirty-two states closely follow the MBCA format. *Id.* at n.31. However, many states' dissolution statutes contain significant differences from the MBCA format and no particular pattern can be identified. *Id.*

between shareholders in close corporations.⁶² The reason for this judicial reluctance or timidity in granting dissolution as a remedy is because many courts still refer to it as "drastic" and "harsh."⁶³ Professor O'Neal calls for the courts to place less emphasis on the supposed harshness of the dissolution remedy, and instead grant dissolution upon a showing of less extensive and less serious acts of fraud or oppression than courts have typically required in the past.⁶⁴ However, many states only authorize dissolution upon shareholder deadlock, which does not cover cases of oppression.⁶⁵ The only hope an oppressed minority shareholder has in such states is to pursue a claim under

⁶² HAYNSWORTH, *supra* note 60, at 32.

⁶³ See, e.g., *KBM, Inc. v. Mackichan*, 386 N.W.2d 914, 916 (N.D. 1986) (forced dissolution is drastic remedy which should be invoked with extreme caution and only when justice requires it). See generally J. TINGLE, *THE STOCKHOLDER'S REMEDY OF CORPORATION DISSOLUTION* 47 (1959) (stating that "liquidation is a sanction, often the harshest sanction"); O'NEAL & THOMPSON, *supra* note 8, § 9.26, at 113 (discussing court's reluctance to terminate profitable going concern); Comment, *supra* note 58, at 496-97 (listing examples of drastic consequences of dissolution).

⁶⁴ OPPRESSION, *supra* note 20, § 10:05, at 22; see *O'Donnell v. Marine Repair Services, Inc.*, 530 F. Supp. 1199, 1206 (S.D.N.Y. 1982) (plaintiff entitled to dissolution upon expulsion from company which constituted oppression); *McCauley v. Tom McCauley & Sons, Inc.*, 104 N.M. 523, 724 P.2d 232, 235-38 (1986) (dissolution held proper where wife established oppressive conduct by husband in closely held ranching operation); *In re Kemp & Beatley, Inc.*, 64 N.Y.S.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1180-81 (1984) (court should not hesitate to order dissolution where withholding of dividends amounted to oppression); see also *Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208, 170 N.E.2d 131, 138 (1960) (first case in which statutory dissolution was granted solely because of oppressive conduct by those in control). But see *Abel v. Forrest Realty*, 484 So. 2d 1069, 1071-72 (Ala. 1986) (plaintiff excluded from board of directors but court found no oppressive acts to justify dissolution); *Interlake Porsche & Audi, Inc. v. Blackburn*, 45 Wash. App. 502, 728 P.2d 597, 612 (1985) (trial court's dissolution order reversed because of no specific finding of oppression). In *Kisner v. Coffey*, 418 So. 2d 58 (Miss. 1982), the Mississippi Supreme Court reversed a chancellor's finding that the mere refusal by shareholders to re-elect the complaining shareholders as directors amounted to oppression and justified a future dissolution of the corporation. *Id.* at 61-62. The supreme court stated that the evidence did not rise to the level of being "oppressive" under the statute. *Id.* at 62. See also *Capitol Toyota v. Gervin*, 381 So. 2d 1038 (Miss. 1980), where the court similarly refused to order dissolution on the statutory ground of oppression because the minority shareholder's "reasonable expectations" had been disproportioned, but not grossly so. *Id.* at 1039.

Based on the reasoning in *Kisner* and *Capitol Toyota*, it seems that the Mississippi judiciary would be willing to order dissolution, however, it obviously would require a somewhat strong showing of oppression.

⁶⁵ See Haynsworth, *supra* note 60, at 39. The statutes in 15 states do not authorize involuntary dissolution on the grounds of oppression or the related concept of unfairly prejudicial conduct. *Id.* at 39 n.58.

breach of fiduciary duty principles.⁶⁶

The majority of American courts have not adopted this narrow approach, recognizing that involuntary dissolution statutes are a legislative response to distinctive problems of oppressed minority shareholders in close corporations, and have interpreted such statutes broadly to meet these problems.⁶⁷

The traditional method for implementing dissolution, whether ordered on statutory or common-law grounds, is by appointment of a "receiver" to wind up the affairs of the corporation and liquidate its assets.⁶⁸ Similarly, many courts consider appointment of a receiver harsh and extreme, and will do so only if no other remedy will work.⁶⁹

Modern corporate statutes have expanded the grounds for involuntary dissolution in broader, more elastic terms, and many courts have taken a sympathetic interpretation of such statutes by stretching the definition of oppression to its outermost limits. Thus, dissolution suits are having increasing success in gaining satisfactory settlements for oppressed minority shareholders.⁷⁰ The mere availability of dissolutions as a remedy for oppression can, in many circumstances, be a

⁶⁶ *Id.* at 40. See *Lewis v. Jones*, 107 App. Div. 2d 931, 483 N.Y.S.2d 868, 869 (1985) (court allowed dissolution suit by minority stockholder lacking standing by holding that statute did not preempt common-law right to dissolution where officers violate fiduciary duty). See generally *supra* notes 45-47 and accompanying text.

⁶⁷ See, e.g., *Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987) (oppression is expansive term intended to cover multitudes of situations involving misconduct which is neither illegal nor fraudulent); see also *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649, 656 (1985) (showing greater willingness to grant dissolution when it is only way to protect minority's reasonable expectations); *Giannotti v. Hamway*, 387 S.E.2d 725, 733-34 (Va. 1990) (ordering dissolution as exclusive remedy in case of "harsh and long-continued oppression"). But see *Jordon v. Bowman Apple Prods.*, 728 F. Supp. 409, 415 (W.D. Va. 1990) (holding that statutory remedies supersede common-law right of action for oppression). See generally Annotation, *What Amounts to "Oppressive" Conduct Under Statute Authorizing Dissolution of Corporation at Suit of Minority Stockholders*, 56 A.L.R. 3d 358, 363-67 (1974) (for summary of cases granting dissolution).

⁶⁸ See REVISED MODEL BUSINESS CORP. ACT. § 14.32(a) (authorizing court in judicial proceeding for dissolution to appoint one or more receivers to wind up and liquidate); MISS. CODE ANN. § 79-4-14.32(a) (same). See generally O'NEAL & THOMPSON, *supra* note 8, § 9.31, at 149 (discussing court's use of receivers and various receiver statutes).

⁶⁹ *Id.*; see *Lyman v. Spain*, 774 F.2d 495, 498 (D.C. Cir. 1985) (appointment of receiver only relief that will remedy serious prejudice to minority); *Dotlich v. Dotlich*, 475 N.E.2d 331, 344 (Ind. App. 1985) (receiver appropriate even though it is drastic remedy, when no other remedy would protect corporate assets). But see *Cowin v. Bresler*, 741 F.2d 410, 417 (D.C. Cir. 1984) (must be immediate risk of great loss to appoint receiver to liquidate solvent going business).

⁷⁰ OPPRESSION, *supra* note 20, § 7.21, at 157.

strong deterrent to an oppressive majority.⁷¹

B. Buy-Out

The broadening of grounds for involuntary dissolution has been accompanied by an increase in various alternative remedies for the oppressed minority shareholder. This link between the availability of less drastic remedies and the breakdown of legislative and judicial resistance in granting relief is to be expected in light of the modern recognition of the unique needs of the minority in the close corporation. Thus, the lower threshold required for minority relief and the broader remedies complement each other to the benefit of the minority shareholder.⁷²

The increased use of buy-outs as a remedy is the most dramatic recent change in close corporation problems.⁷³ For example, section 42(a) of the *Model Statutory Close Corporation Supplement* to the 1984 *Model Business Corporation Act* states that if "ordinary relief" under section 41 is inadequate or inappropriate, then as "extraordinary relief" a court may order the corporation dissolved unless the corporation or one of its shareholders purchases the dissatisfied shareholders shares for their fair value as defined under section 42(b).⁷⁴ In a recent survey of cases, it was determined that a court-supervised buy-out was the predominant form of ultimate relief and occurred twice as frequently as a court-ordered dissolution.⁷⁵ Assuming fair value is received, a buy-out gives the minority a cash-out right that they otherwise would not have had, while allowing the enterprise to continue as a

⁷¹ *Id.* § 10:09, at 58.

⁷² See Thompson, *supra* note 10, at 228 (stating that these alternative forms of relief spring from recognition of vulnerable position of minority and their special needs).

⁷³ *Id.* at 231. Legislative and/or judicial support for buy-outs now exists in more than 20 states, with courts ordering buy-outs under their general equity powers even absent specific statutory authority. *Id.*; see *Hendley v. Lee*, 676 F. Supp. 1317, 1324 (D.S.C. 1987) (forced buy-out better than dissolution because of continued profitability and growth potential of corporation); *Matter of Brach*, 135 A.D.2d 711, 522 N.Y.S.2d 612, 613 (App. Div. 1987) (shareholder not entitled to dissolution where merely dissatisfied with management and available buy-out option would provide fair return on his investment).

⁷⁴ MODEL STATUTORY CLOSE CORP. SUPP. § 42(a), (b) (1989). The MODEL STATUTORY CLOSE CORP. SUPP. is published in 4 *Model Bus. Corp. Act. Ann.* 1803-80 (3d ed. 1986). Mississippi has not adopted the MODEL STATUTORY CLOSE CORP. SUPP., nor does it have a specific "buy-out" statute. See generally O'NEAL & THOMPSON, *supra* note 8, § 9.34, at 158-64 (thorough discussion of buy-out statutes in various states).

⁷⁵ See Haynsworth, *supra* note 60, at 53 (where 20 of 37 involuntary dissolution cases in 1984-85 resulted in buy-outs).

going concern for the benefit of the other shareholders.⁷⁶

Modern courts using their inherent equitable powers have increasingly ordered buy-outs even in absence of statutory authority.⁷⁷ Therefore, the most recent statutes and judicial decisions have begun to codify what has actually been occurring in the marketplace.⁷⁸

C. Appointment of a Custodian

Some state statutes allow courts to appoint a custodian as an alternative remedy to dissolution.⁷⁹ Others allow the appointment of a custodian specifically as a remedy for oppressive conduct by the majority.⁸⁰ A custodian is different from a receiver in that a custodian is authorized to manage the business affairs of the corporation rather than to wind up the business and liquidate its assets. A custodian has broad power to act alone without approval of the board of directors.⁸¹ However, this may create problems in a close corporation because normally ownership is not separated from management and a closely held business may not prosper as well in the hands of an outside manager.⁸²

⁷⁶ *Id.*; OPPRESSION, *supra* note 20, § 10:09, at 60.

⁷⁷ See *Stefano v. Coppock*, 705 P.2d 443, 445 (Alaska 1985) (inadequate notice of meetings and failure to allow inspection of corporate records sufficient as oppression to warrant forced buy-out of minority); *Maschmeier v. Southside Press, Ltd.*, 435 N.W.2d 377, 381 (Iowa Ct. App. 1989) (court sitting in equity can devise remedy for oppression to meet situation; buy-out minority's shares ordered); *McCauley v. Tom McCauley & Sons, Inc.*, 104 N.M. 523, 724 P.2d 232, 236 (Ct. App. 1986) (corporation given option of buying out minority even though dissolution statute did not authorize it); *In re Joy Wholesale Sundries, Inc.*, 125 App. Div. 2d 310, 508 N.Y.S.2d 594, 595 (1986) (petition for dissolution converted to buy-out when corporation elected to buy plaintiffs' shares); *In re Weidy's Furniture Clearance Center*, 108 App. Div. 2d 81, 487 N.Y.S.2d 901, 904 (1985) (courts have broad latitude in fashioning alternative relief to dissolution); *Davis v. Sheerin*, 754 S.W.2d 375, 380 (Tex. Ct. App. 1988) (court may use general equity powers to order remedy less harsh than dissolution and may decree buy-out).

⁷⁸ See *Thompson*, *supra* note 10, at 232. A recent study showed that in almost all judicially ordered dissolution cases, the corporation was not actually liquidated, but rather the participants reached a contractual solution whereby one shareholder's interest was purchased by another. *Id.*

⁷⁹ See, e.g., DEL. CODE ANN. tit. 8, § 352 (1983) (allowing appointment of custodian when any petitioning shareholder in close corporation has right to dissolution).

⁸⁰ See, e.g., PA. STAT. ANN. tit. 15, § 1767(a)(2) (Purdon 1990 Pamphlet) (court may appoint custodian in case of closely held corporation where directors or those in control have acted illegally, oppressively or fraudulently to holders of 5% or more outstanding shares); see also *ARC Mfg. v. Konard*, 321 Pa. Super. 72, 467 A.2d 1133, 1138 (1983) (court appointed custodian for breach of fiduciary duties).

⁸¹ See generally O'NEAL & THOMPSON, *supra* note 8, § 9.33, at 155 (full discussion of custodianship as alternative to dissolution).

⁸² See *Thompson*, *supra* note 10, at 229-30 (suggesting that outside management is

Obviously, the participants will need to arrive at a better solution quickly, or a potentially more drastic remedy will be required.

D. Equitable Alternatives to Dissolution - Court-Fashioned Remedies

In order to overcome the traditional reluctance of courts to order anything other than dissolution in oppressed minority cases, courts need broad discretion in fashioning the most appropriate remedy short of dissolution before they in fact dissolve a corporation. This discretion should take into consideration all factors relevant to the particular situation, because what will work in one case may not necessarily work in another. Thus, detailed oppression statutes might unduly restrict a court's discretion in awarding the most equitable remedy. Courts should be willing to grant relief in proportion to the degree of mistreatment suffered by the minority shareholder. There should be, in effect, a balancing test used between the harm produced and the remedy awarded.⁸³ There is no reason why courts themselves are not more energetic and imaginative in developing effective remedies in oppression cases. In the past, American courts have been extremely conservative and unresourceful in providing remedies for oppressed minority shareholders.⁸⁴ However, recent decisions have indicated an increased willingness to fashion a remedy suited to the particular problem. Several courts have listed ten or more possible remedies,⁸⁵ including the following:

- (a) The entry of an order requiring dissolution of the corporation at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date;
- (b) The appointment of a receiver, not for the purposes of

contrary to scheme of closely held corporations).

⁸³ Olson, *supra* note 1, at 642-43.

⁸⁴ See OPPRESSION, *supra* note 20, § 10:05, at 20.

⁸⁵ See, e.g., Sauer v. Moffitt, 363 N.W.2d 269 (Iowa App. 1984) (allowing other equitable relief under liquidation statute); Balvik v. Sylvester, 411 N.W.2d 383, 388-89 (N.D. 1987) (allowing alternative equitable remedies under statute which only authorized dissolution as remedy for oppressive conduct); see also McCauley v. Tom McCauley & Son, Inc., 104 N.M. 523, 724 P.2d 232, 243 (Ct. App. 1986) (recognizing availability of remedies not specifically stated in oppressive conduct statute, including utilization of court's "reservoir of equitable powers" to avoid harshness of dissolution); MODEL STATUTORY CLOSE CORP. SUPP. § 41(A) (1989) (listing 9 types of "ordinary relief" for oppressive conduct). See generally Olson, *supra* note 1, at 643-45 (listing 15 types of remedial options short of dissolution).

dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until the differences are resolved or 'oppressive' conduct ceases;

(c) The appointment of a "special fiscal agent" to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose;

(d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or "special fiscal agent";

(e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated;

(f) The issuance of an injunction to prohibit continuing acts of "oppressive" conduct and which may include the reduction of salaries or bonus payments found to be unjustified or excessive;

(g) The ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital;

(h) The ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined according to a specified formula or at a price determined by the court to be a fair and reasonable price;

(i) The ordering of affirmative relief by the entry of an order permitting minority stockholders to purchase additional stock under conditions specified by the court;

(j) An award of damages to minority stockholders as compensation for an injury suffered by them as the result of "oppressive" conduct by the majority in control of the corporation.⁸⁶

The most complete formulation of the various potential remedies for alternatives to dissolution is found in sections 41-43 of the *Model Statutory Close Corporation Supplement*. In codifying priorities, the *Model Supplement* divides relief into three categories: (1) section 41 "ordinary relief" (such as accounting and appointment of custodian); (2) section 42 "extraordinary relief" (requiring shareholder to sell his

⁸⁶ *Balvik*, 411 N.W.2d at 388-89 (quoting *Baker v. Commercial Body Builders, Inc.*, 264 Or. 614, 631-33, 507 P.2d 387, 395-96 (1973)).

shares at fair value); and (3) "extraordinary relief: Dissolution," (authorized only as a last resort). This tiering of remedies basically reflects the actual result in involuntary dissolution suits.⁸⁷

IV. CONCLUSION

We are witnessing a developing trend in the law of close corporations - from the development of the reasonable expectations standard and the complementary doctrine of fiduciary duty, to the judicial and legislative lowering of the minority relief threshold and the granting of alternative remedies to dissolution. These changes have all occurred simultaneously with the recognition of the unique needs of the minority shareholder in the closely held corporation. Accordingly, attorneys for minority shareholders should not hesitate to utilize procedures or ask for remedies that have not been available or considered practical in the past. The vast new developments in close corporation law now encourage courts to grant remedies that they previously failed to consider or thought they lacked power to grant.⁸⁸ This new freedom being experienced by the courts is in the best interests of both minority and majority shareholders in close corporations.⁸⁹ The courts' recent recognition of broad equitable powers outside the specific language of narrow dissolution statutes opens up the door to the most equitable resolution of majority/minority shareholder disputes by allowing a carefully groomed remedy for each fact specific scenario. The disputes arising among shareholders in close corporations are so unique to the particular corporation that any attempt to narrow the available remedies would be an unjustifiable limitation of a court's discretion.

Concurrently, the courts must protect the rights of the majority shareholders. If courts begin to grant remedies at an unjustifiably low threshold or grant remedies that are too harsh, then the tyranny of the minority would be able to take advantage of the majority. Obviously, a balance between these two competing interests must be struck, and broad use of equitable principles is the only way to maintain this balance.

⁸⁷ See generally Haynsworth, *supra* note 60, at 41-43 (discussing various states' statutory forms of alternative relief, and *Statutory Close Corporation Supplement* in particular).

⁸⁸ See O'Neal, *supra* note 5, at 140.

⁸⁹ But see Note, *supra* note 3, at 1152-53 (concluding that equity has failed to establish basis on which courts will freely grant dissolution, and asking for legislation with more specific guidelines which are mandatory rather than permissive, such as listing particular acts of majority shareholders warranting dissolution).

In Mississippi, it appears that the courts are willing to protect minority shareholders to the extent of holding minority and majority shareholders to a strict fiduciary duty standard as evidenced by the *Fought v. Morris*⁹⁰ decision. However, the Mississippi courts made it clear in *Capitol Toyota v. Gervin* and *Kisner v. Coffey*⁹¹ that they will not decree dissolution unless the oppression is "gross." It follows then that Mississippi is in a perfect position to offer closely tailored remedies to oppressed minority shareholders, if the courts are willing to take advantage of their broad equitable powers.

Arthur D. Spratlin, Jr.

⁹⁰ See *supra* note 44.

⁹¹ See *supra* note 64.

RECENT DECISION

CORPORATIONS — FIDUCIARY DUTY — IN A CLOSE CORPORATION, A MAJORITY SHAREHOLDER OWES A FIDUCIARY DUTY TOWARDS THE MINORITY WHEN SEEKING A CONTROLLING SHARE

Plaintiffs¹ filed a breach of contract action in the Chancery Court of Warren County against the defendants² for violation of a stock redemption agreement.³ Plaintiffs alleged that the defendants breached a fiduciary duty⁴ by not following the terms of the agreement⁵ and, sub-

¹ Plaintiffs who sought actual and punitive damages, were former shareholders, Mr. Billy L. Fought and Elza Fought, in a close corporation. *Fought v. Morris*, 543 So. 2d 167, 169 (Miss. 1989).

² *Id.* at 168. The defendants were the close corporation, Vicksburg Tool and Manufacturing, Inc., and its controlling shareholder, Brady M. Morris. *Id.* The close corporation, a business entity consisting of a few shareholders possessing stock that is not publicly traded, originated with four men as shareholders, including the plaintiff and the defendant as vice-president and president, respectively. *Id.* at 169. However, one shareholder, Clayton A. Strong, sold his shares equally to the other three pursuant to a stock redemption agreement with the exception of one share to each of the shareholders' spouses. *Id.*

³ *Id.* at 168. The agreement between the shareholders stated that a shareholder desiring to sell his stock should first offer the stock for sale to the corporation. *Id.* If the corporation did not accept the offer within thirty days, then the stockholders had the right to buy out the seller on a pro-rata basis. *Id.* If a shareholder declined to buy his portion of the stock, the agreement provided that the other stockholders could purchase the unaccepted stock. *Id.* The purpose of such an agreement restrained the transferability of stock and maintained a balance of power. *Id.* at 172.

⁴ *Id.* at 169. The plaintiffs alleged that the defendants had a good faith obligation to adhere to the terms of the agreement as originally set forth in the formation of the close corporation. *Id.*

⁵ *Id.* The controversy arose when one of the three remaining shareholders, John S. Peyton, sold his stock to Morris, giving Morris a controlling share over Fought. *Id.*

sequently, fraudulently undervalued the plaintiffs' stock.⁶ The trial court entered judgment for the defendants finding that the parties were not in a fiduciary relationship.⁷ On appeal, the Mississippi Supreme Court, *held*, reversed and remanded.⁸ In a close corporation, the shareholders have a fiduciary duty of good faith towards each other, and a majority shareholder's attempt to gain a controlling interest must be "intrinsically fair" to the minority shareholder. *Fought v. Morris*, 543 So. 2d 167, 171 (Miss. 1989).

The concept of a fiduciary duty existing between shareholders in a close corporation developed from deep roots.⁹ In the leading case of

Fought made a counter offer to buy a pro-rata share of Peyton's stock under the terms of the agreement. *Id.* Morris' offer for Peyton's stock included releasing Peyton as guarantor on the bank note, a term Fought was not willing to accept. *Id.* Fought alleged that Morris subsequently bypassed the agreement and purchased all of Peyton's shares. *Id.*

⁶ *Id.* at 174. After the transfer of stock from Peyton to Morris, Morris fired Fought as an officer and employee, and Fought resigned his appointment to the Board of Directors. *Id.* at 173. Subsequently, Morris bought out Fought's interest in the corporation. *Id.* Fought claimed that the stock redemption agreement required Morris to pay the fair market value of the shares but that the value paid for the shares did not represent their reasonable value. *Id.*

⁷ *Id.* at 169. The trial court concluded that the plaintiffs could not complain of a violation of the stock redemption agreement since Peyton and Strong were not made parties to the action, and therefore, no breach of a fiduciary duty occurred when Morris scrambled for additional stock. *Id.* The trial court also held that the purchase price of Fought's stock was not unreasonably low. *Id.* at 173.

⁸ *Id.* at 167. The court concluded the evidence unquestionably showed that Fought may not have been offered the fair market value for his shares at the time of dissolution, and it remanded to the trial court for proper determination. *Id.* at 173.

⁹ Johnson, *Strict Fiduciary Duty in Close Corporations: A Concept in Search of Adoption*, 18 CAL. W.L. REV. 1, 2 (1982). In the development of corporate law concerning fiduciary duties of shareholders, courts established very early that the managers and directors of a corporation owe a fiduciary duty of good faith to the corporation and its shareholders. *Id.*; see, e.g., *Elliot v. Baker*, 194 Mass. 518, 80 N.E. 450, 452 (1907) (two directors of corporation could not fraudulently seek control of corporation and had to handle interest of corporation in good faith); *Gibson v. Manuel*, 534 So. 2d 199, 203 (Miss. 1988) (fiduciary duty of corporate directors and officers required defendant to discharge duty in "good faith and with that degree of care" dictated by such a duty); *Ellzey v. Fyr-Pruf, Inc.*, 376 So. 2d 1328, 1332 (Miss. 1979) (holding that "self-dealing," where corporation and fiduciary bargain on opposite sides of transaction, automatically raises presumptive conflict of interests); *American Empire Life Ins. Co. v. McAdory*, 319 So. 2d 237, 240-41 (Miss. 1975) (corporate officers who turned corporate opportunity to their personal benefit breached fiduciary duty owed to corporation and shareholders); *Cooper v. Mississippi Land Co.*, 220 So. 2d 302, 304, 309 (Miss. 1969) (corporate directors owe fiduciary duty to creditors and may not use position to benefit themselves at minority's expense); *Knox Glass Bottle Co. v. Underwood*, 228 Miss. 699, 742, 89 So. 2d 799, 814 (1956) (directors of corporation while not trustees in technical sense, occupied fiduciary relationship to corporation and its stockholders), *cert. denied*, 353 U.S. 977

Southern Pacific Co. v. Bogert,¹⁰ the United States Supreme Court clearly established and defined the fiduciary obligations between majority and minority shareholders in a corporation.¹¹ In the case, Henry L. Bogert and other minority shareholders in the Houston & Texas Central Railway Company brought suit against Southern Pacific Company for breach of a fiduciary duty to the minority shareholders.¹² The controversy arose when Southern Pacific Company participated in a reorganization plan which, according to the plaintiffs, unjustly prevented the minority shareholders from receiving any proceeds.¹³ The court found that Southern Pacific Company violated a fiduciary duty to the minority when it used its position as controlling shareholder to prevent the minority shareholders from receiving the benefits of the plan.¹⁴ In so holding, the court established the rule that a majority shareholder in control of stock must act fairly towards the minority, and thus, all actions by the majority when in control must be subject to a fiduciary duty.¹⁵ Although the rule of a majority's fiduciary duty

(1957); *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 123 N.E. 148, 150 (1919) (directors in corporation had fiduciary relationship with corporation and its stockholders). See generally W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 838 (rev. perm. ed. 1986 & Supp. 1988) (all jurisdictions now recognize fiduciary duty between officers and shareholders).

¹⁰ 250 U.S. 483 (1919).

¹¹ *Southern Pac. Co.*, 250 U.S. at 487. The Court stated that it simply carried over the rule as enunciated by the trial court and affirmed by the Second Circuit Court of Appeals in the case. *Id.* The Supreme Court further noted that the obligation of a majority shareholder to a minority shareholder had received some approval in corporate policy. *Id.* at 487-88.

¹² *Id.* at 486. The Houston & Texas Central Railway Company had been dominated by Southern Pacific Company to the extent that the Houston Company's directors and officers were elected by one of Southern Pacific Company's subsidiaries. *Id.* Because the subsidiary company held a majority of the stock in the Houston Company, the Court deemed Southern Pacific Company as the majority and controlling stockholder. *Id.*

¹³ *Id.* at 487. Under the reorganization plan, Southern Pacific Company released its rights and interest in the Houston Company in consideration for a sum of money. *Id.* The minority stockholders in the Houston Company alleged that Southern Pacific Company unfairly chose to retain all of the proceeds instead of giving them a pro-rata share. *Id.*

¹⁴ *Id.* at 488. The Court added that because of the necessity of fairness when a majority shareholder sold corporate property, the majority could never exclude the minority from participation in the fruits of the sale. *Id.* Denying minority shareholders participation in the benefits of the corporation is tantamount to self-dealing and is an abuse of corporate process. *Fought v. Morris*, 543 So. 2d 167, 170 (Miss. 1989); see *Coleman v. Taub*, 638 F.2d 628, 635 (3d Cir. 1981) (fiduciary duty of majority to minority arises independent of any merger statute and may or may not be violated in "freeze-out" procedures).

¹⁵ *Southern Pac. Co.*, 250 U.S. at 487-88. The court added that "[i]t is the fact of

applied to all corporations, the rule surprisingly did not receive uniform and immediate approval particularly in the context of a small, closely held corporation.¹⁶

The Mississippi Supreme Court had a chance to consider the fiduciary obligations between shareholders in a close corporation¹⁷ in the case of *Ross v. Biggs*.¹⁸ In *Ross*, J.T. Biggs, Sr. and J.T. Biggs, Jr. were sole shareholders in an incorporated hardware business.¹⁹ The administrator of the estate of J.T. Biggs, Sr., brought suit against the decedent's son for a breach of contract and claimed that the son, who controlled the business, fraudulently misled his father into entering a disadvantageous stock purchase plan.²⁰ The court found that although

control of the common property held and exercised, not the particular means by which or manner in which control is exercised, that creates the fiduciary obligation." *Id.* at 492; see *Pepper v. Litton*, 308 U.S. 295, 307 (1939) (reaffirmed holding that controlling shareholders must show their dealings were in good faith towards corporation and shareholders). See generally Note, *The Fiduciary Duty of Controlling Shareholders*, 7 CASE W. RES. 467, 468 (1956) (fiduciary duty of majority shareholders received its genesis in *Southern Pac. Co.*).

¹⁶ Recent Case, 61 CORNELL L. REV. 986, 987 (authored by Allan H. Farnsworth) (1976). A major reason for judicial reluctance in application of a fiduciary duty between majority and minority shareholders rested on the fact that general corporate policy recognized no fiduciary duty between shareholders in a corporation. *Id.*; see Heatherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 12 (1987) (shareholders in corporate law and in context of public corporations owe no fiduciary duty to each other). See generally Saliterman, *Dissolution and Buy Out Provisions as Potential Solutions for Close Corporation Dissent*, 1984 UTAH L. REV. 38, 42 (lack of distinction between types of corporations requires close corporations to rely on disadvantageous law).

¹⁷ Note, *The Closely-held Company and Minority Oppression*, 3 OXFORD J. OF LEGAL STUD. 417, 417 (1983) (authored by D. Prentice). Generally a closely-held corporation is composed of a small number of people who conduct business based on "mutual trust and confidence." *Id.* Most members of the closely-held corporation will participate in management decisions and therefore will receive at least a part of their investment in salary rather than dividends. *Id.* Finally, shares in a closely-held corporation are relatively restricted upon transfer. *Id.*

¹⁸ 206 Miss. 542, 40 So. 2d 293 (1949), *overruled*, *Fought v. Morris*, 543 So. 2d 167 (Miss. 1989).

¹⁹ *Ross*, 206 Miss. at 550, 40 So. 2d at 294. The father and son were previously partners but later created a close corporation by the name of J.T. Biggs & Son, Inc. *Id.*

²⁰ *Id.* Under the stock purchase plan, the son received 75 shares of his father's stock in the business. *Id.* In return for the shares, the son agreed to pay his father a minimum of \$10,000 of which \$1,000 was payable in cash immediately with the remainder payable at the rate of \$150 per month for the life of the father. *Id.* The plaintiff primarily alleged that the value paid for the stock represented significantly less than the fair market value, and therefore, the son breached a fiduciary duty to his father by not paying the full value. *Id.* at 552, 40 So. 2d at 295.

the son gained control of the business, the son did not breach any fiduciary relationship to the corporation.²¹ The court based its decision on the rule that stockholders in a family corporation do not "bear towards each other that same relation of trust and confidence which prevails in partnerships."²² The applicable rule was stated to be that "a fiduciary relation is one in which, if wrong arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust."²³ Contrary to rulings such as that in *Ross*, in following years a noted trend occurred towards the special recognition of a fiduciary duty between majority and minority shareholders in the context of a close corporation.²⁴

In a 1957 District of Columbia Court of Appeals decision, *Helms v. Duckworth*,²⁵ the court followed the trend towards the special treatment of close corporations and firmly established a rule that placed fiduciary obligations between shareholders in a close corporation.²⁶ In

²¹ *Id.* at 555, 40 So. 2d at 296. The court noted that a corporation held in its name the title to everything owned by it and as such should be seen in a different light from other fiduciary relationships. *Id.*

²² *Id.* The court justified this rule simply by stating that a partnership differed from a corporation and, therefore, "the trust and confidence reposed by each partner in the other . . . has no application as between stockholders in a corporation." *Id.*; see *Slade v. Slade*, 337 Ill. App. 575, 86 N.E.2d 425, 429 (1949) (fact that mere resemblance between close corporation and partnership exists does not require similar treatment); *Cardullo v. Landau*, 329 Mass. 5, 105 N.E.2d 843, 845 (1952) (close corporation did not establish trust and confidence between shareholders). *But see* *Krebs v. McDonald's Electrix*, 266 S.W.2d 87, 89 (Ky. 1953) (shareholders in close corporation had relationship of trust and confidence).

²³ *Ross*, 206 Miss. at 557, 40 So. 2d at 297 (citing *Wall v. Wall*, 177 Miss. 743, 749, 171 So. 675, 677 (Miss. 1937)). The court held that since such factors as love, gratitude, affection, or partiality may motivate a man of sound mind to execute a will or deed, there was not sufficient proof, in this case, of any breach of fiduciary duty by the defendant. *Id.*

²⁴ *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577, 584 (1956). The court in *Galler* stated that a trend occurred towards judicial treatment of close corporations as "sui generis." *Id.*; see, e.g., *Funk v. Spalding*, 74 Ariz. 219, 246 P.2d 184, 187 (1952) (partners who incorporated carried with them fiduciary relationship to corporation); *Gord v. Iowana Farms Milk Co.*, 245 Iowa 1, 60 N.W.2d 820, 830 (1953) (idea of fairness applied between shareholders especially in small, closely held corporation); *Application of Burkin*, 286 A.D. 740, 147 N.Y.S.2d 2, 5 (N.Y. App. Div. 1955) (stockholders in closely held corporation have fiduciary duty to be honest and open with fellow stockholders and duty to make disclosure of all essential information), *rev'd on other grounds*, 1 N.Y.2d 898, 136 N.E.2d 862, 154 N.Y.S.2d 989 (1956).

²⁵ 249 F.2d 482 (D.C. Cir. 1957).

²⁶ *Helms*, 249 F.2d at 486-87. The *Helms* court recognized that because of the uniqueness of the closely held corporation, it should be treated differently than a regular, public corporation. *Id.*; see *Recent Case*, 72 HARV. L. REV. 555, 556 (1959) (holding in

Helms, the administratrix of the estate of a majority shareholder in a "two-man" corporation brought suit for the cancellation of a stock redemption agreement and claimed the agreement unfairly operated against his interest.²⁷ The court noted that contrary to a regular public corporation, shareholders in a close corporation occupy a position similar to that of joint adventurers and partners.²⁸ Because of this relationship, the court concluded that the majority and minority shareholders in a close corporation, like partners, bear a fiduciary duty to deal openly, honestly and in good faith with their fellow stockholders in corporate transactions.²⁹

Almost twenty years later, the Massachusetts Supreme Judicial Court followed *Helms* in *Donahue v. Rodd Electrottype Co. of New England*,³⁰ but expanded the fiduciary duty, both by clarifying its definition and by heightening the duty.³¹ In *Donahue*, the plaintiff, a mi-

Helms clearly originated rule concerning fiduciary relationships existing between shareholders in close corporation).

²⁷ *Helms*, 249 F.2d at 482. The defendant, Duckworth, entered into the agreement with *Helms* eight years prior to *Helms*'s death. *Id.* at 483-84. The stock repurchase agreement allowed one shareholder to buy the other shares at a set price in the event that one died. *Id.* at 484. The price could have been modified under the agreement to reflect the changing value of the stock. *Id.* When *Helms* died, Duckworth purchased the stock at a cheap unadjusted price. *Id.* The plaintiffs alleged Duckworth misrepresented that he would consent to a periodic redetermination of the stock purchase price. *Id.*

²⁸ *Id.* at 486 (citing Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 LAW & CONTEMP. PROBS. 435, 440 (1953)). The court added that in the context of the close corporation, the stockholders, directors and managers are usually all the same persons. *Id.*

²⁹ *Id.* at 487. The court added that since the shareholders in a close corporation occupy official positions, it seemed appropriate to apply the fiduciary duty as established between controlling shareholders and other shareholders. *Id.* Several jurisdictions followed the recognition of a fiduciary duty of good faith as stated in the *Helms* decision. See, e.g., *Blevins v. Wagon*, 281 Ark. 272, 664 S.W.2d 198, 200 (1984) (recognized principle that close corporation shareholders and officers owe fiduciary duty to corporation and duty of fairness to each other); *Illinois Rockford Corp. v. Kulp*, 41 Ill. 2d 215, 242 N.E.2d 228, 233 (1968) (decision of partner to incorporate as close corporation did not change obligation of good faith between shareholders); *Sampson v. Hunt*, 222 Kan. 268, 564 P.2d 489, 492 (1977) (stockholders in close corporation should adhere to duty of fairness towards other stockholders). But cf. *Baylor v. Jordan*, 445 So. 2d 254, 256 (Ala. 1984) (two shareholders with equal knowledge in close corporation possessed no fiduciary duty); *Johns v. Caldwell*, 601 S.W.2d 37, 41-42 (Tenn. Ct. App. 1980) (because stock in corporation was closely held did not necessarily mandate finding of fiduciary relationship among all shareholders); *Kaspar v. Thorne*, 755 S.W.2d 151, 155 (Tex. Ct. App. 1980) (although fiduciary duty may exist in some instances, duty did not exist as matter of law between all shareholders in close corporations).

³⁰ 367 Mass. 578, 328 N.E.2d 505, 512 (1975).

³¹ *Donahue*, 328 N.E.2d at 515. The court stated that it needed to establish a clearer

nority shareholder, argued that when the corporation purchased shares from the controlling shareholder without offering to purchase her minority shares under the same terms, the corporation breached a fiduciary duty to her as a minority shareholder.³² The court agreed and held that because of resemblances of the close corporation to a partnership,³³ shareholders have essentially the same fiduciary duties of good faith that partners owe to each other.³⁴ Furthermore, the court based

standard primarily because the Massachusetts courts prior to *Donahue* had created no universal rule as to the fiduciary duties between shareholders in a close corporation. *Id.* at 516-17; *see, e.g.,* *Wilson v. Jennings*, 344 Mass. 608, 184 N.E.2d 642, 646 (1962) (if parties arranged for permanent equal participation and obligated themselves to disclose relevant information, then relationship between shareholders required trust and confidence); *Samia v. Central Oil Co. of Worcester*, 339 Mass. 101, 158 N.E.2d 469, 476 (1959) (familial nature of relationship between shareholders in close corporation required standard of "particularly scrupulous fidelity"); *Mendelsohn v. Leather Mfg. Co.*, 326 Mass. 226, 93 N.E.2d 537, 541 (1950) (fiduciary relationship between shareholders who acted as joint venturers prior to incorporation is one of "finest loyalty"); *Sher v. Shandler*, 325 Mass. 348, 90 N.E.2d 536, 539 (1950) (shareholders in close corporation because of fiduciary-like relationship must fully disclose information). *See generally* Bulloch, *Heightened Fiduciary Duties in Closely Held Corporations: Donahue Revisited*, 16 PAC. L.J. 935, 938 (1985) (stated that because of uncertainty in law, Massachusetts court attempted to create stability with clearer standard).

³² *Donahue*, 328 N.E.2d at 508. The plaintiff brought suit in the form of a stockholders derivative action against the corporation, its directors and the controlling shareholder after the corporation purchased some of the controlling shareholder's interest. *Id.* The purchase involved 45 of 81 shares owned by the controlling shareholder Harry C. Rodd. *Id.* at 510. When the plaintiff learned of the purchase, she requested that the corporation purchase all of her shares under the same terms offered by the corporation to the controlling shareholder. *Id.* at 511. The corporation, however, refused to offer her the same deal. *Id.* *See generally* Recent Case, 89 HARV. L. REV. 423, 424 (1975) (*Donahue* court interpreted complaint as alleging fiduciary duty owed by controlling shareholder but chose instead to consider case in narrow context of close corporation).

³³ *Cressy v. Shannon Continental Corp.*, 177 Ind. App. 224, 378 N.E.2d 941, 945 (1978). A close corporation is likened to a partnership in that the shareholders expect to act and be treated as partners. *Id.* A partnership is "an association of two or more persons to carry on as co-owners a business for profit." UNIF. PARTNERSHIP ACT § 6(1) (1914). The close corporation is thus considered a hybrid in that it has characteristics of a partnership while maintaining benefits of incorporation such as "limited liability, perpetual existence of business entity [and] tax considerations." *Cressy*, 378 N.E.2d at 945; *see also* *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928) (joint adventurers likened to partners); *In re Pivot Punch & Die Corp.*, 15 Misc. 2d 713, 182 N.Y.S.2d 459, 462 (Sup. Ct. 1959) (close corporation deemed equal to partnership). *See generally* 1 F. O'NEAL & R. THOMPSON, O'NEAL'S CLOSE CORPORATIONS: LAW AND PRACTICE § 1.02 (3d ed. 1987) (compared close corporations to partnerships).

³⁴ *Donahue*, 328 N.E.2d at 515. The court added in dicta that the duty applied to minority as well as majority shareholders, because the minority could conceivably do equal damage through improper means to the majority. *Id.* The court also adopted its

its finding on the fact that majority shareholders in close corporations had the resources to use oppressive tactics to "freeze out" the minority, and normally the minority shareholders had no remedy against such tactics.³⁵ Because of the need for protection of minority shareholders from oppressive tactics by the majority and because of the similarities of a close corporation to a partnership,³⁶ the Massachusetts court adopted a more stringent good faith standard of "utmost good faith and loyalty" between shareholders in a close corporation.³⁷

In 1976, the same court which ruled in *Donahue* faced a similar issue in *Wilkes v. Springside Nursing Home, Inc.*³⁸ In *Wilkes*, the

own definition of a close corporation as consisting of a "small number of stockholders who had no ready market for their corporate stock and had substantial majority participation in the management, direction and operations of the corporation." *Id.* at 511. See generally F. O'NEAL & R. THOMPSON, *supra* note 33 (authorities have differed as to clear definition for close corporation).

³⁵ *Donahue*, 328 N.E.2d at 513-15. The court recognized that because of the minority's lack of opportunity to transfer stock and because of the majority's ability to easily manipulate the minority's authoritative and financial standing, the situation in a close corporation lends itself to abuse by a majority over the minority's interest. *Id.*; see also *Evans v. Blesi*, 345 N.W.2d 775, 780 (Minn. Ct. App. 1984) (found breach of fiduciary duty by oppressive tactics when majority obtained minority's resignation under coercion); *Ferber v. American Lamp Corp.*, 503 Pa. 489, 469 A.2d 1046, 1050 (1983) (majority shareholder may act in own best interest, but shareholder's actions must also be in best interest of corporation). See generally Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630, 1630-34 (1961) (discussed various techniques employed by majority shareholders to manipulate minority shareholders).

³⁶ *Donahue*, 328 N.E.2d at 515. The court added that the corporation is often little more than an "incorporated" or "chartered" partnership. *Id.* at 512; see also *Johnson v. Gilbert*, 127 Ariz. 410, 621 P.2d 916, 918 (Ariz. Ct. App. 1980) (partnership principle applied to context of closely held corporation); *Ross v. Tavel*, 418 N.E.2d 297, 304 (Ind. Ct. App. 1981) (applied principle of "incorporated" partnership to close corporation which imposes duty of honesty and openness upon shareholding "partners"); *Solomon v. Atlantis Dev., Inc.*, 147 Vt. 349, 516 A.2d 132, 136 (1986) (shareholders in close corporations have similar duty that exists in partnerships).

³⁷ *Donahue*, 328 N.E.2d at 515. The court held that shareholders "may not act out of avarice, expediency or self interest in derogation of their duty of loyalty to the other stockholders and to the corporation." *Id.* The court acknowledged that it placed a heightened duty on shareholders in a close corporation and it contrasted the duty from a lesser duty of "good faith" recognized between directors and shareholders in regular, public corporations. *Id.* at 516-17. In a concurring opinion, Justice Wilkins expressed concern because the rule seemed to apply to all operations of the close corporation. *Id.* at 521; see Comment, *Corporations: Rights of Minority Shareholders*, 60 MASS. L.Q. 318, 319 (1975) (new standard requires more stringent duty, and in comparison to partnership, heightened duty). See generally Recent Case, 21 VILL. L. REV. 307, 315 (1975) (authored by Jane A. Gross) (criticized application to all corporate activity as too sweeping and detrimental to discretionary rights in business).

³⁸ 370 Mass. 842, 353 N.E.2d 657 (1976).

plaintiff, a minority shareholder, alleged that the majority shareholders violated a fiduciary duty when they instituted a corporate policy that essentially limited his entire income, authority and standing in the corporation.³⁹ The court applied the *Donahue* strict fiduciary standard and found that a breach occurred but added that a majority shareholder in a close corporation may avoid a breach of a fiduciary duty by showing a legitimate business purpose for the decision.⁴⁰ The court added that should the majority show this, the minority may still prove that the majority could have achieved the objective through less harmful action.⁴¹ The court extended and refined the strict standard of fiduciary duty given in *Donahue*⁴² and held that "courts must weigh the

³⁹ *Wilkes*, 353 N.E.2d at 659. In the *Wilkes* case, four men became equal shareholders in a close corporation in 1955. *Id.* at 659. The shareholders attempted to sell a portion of the corporate property to one of the shareholders in 1965. *Id.* at 660. Wilkes successfully prevailed over the other shareholders to procure a higher sale price for the stock than the buyer wanted, thus creating bad blood between him and the other shareholders. *Id.* Wilkes' income from and influence in the corporation was significantly reduced when, in the 1967 annual meeting, the other shareholders did not re-elect Wilkes as an officer of the corporation or as a director. *Id.* at 664. "Most important is the plain fact that the cutting off of Wilkes' salary, together with the fact that the corporation never declared a dividend . . ., assured that Wilkes would receive no return at all from the corporation." *Id.*

⁴⁰ *Id.* at 663. The court noted that other jurisdictions realized the need for decision makers in close corporations to have some discretionary rights in business decisions. *Id.* The court added that without discretionary decision making rights, the operations of the corporation might be unduly hampered. *Id.*; see *Bryan v. Brock & Blevins Co.*, 343 F. Supp. 1062, 1068 (N.D. Ga. 1972) (proposed merger transaction in corporation lacked "plausible business purpose"), *aff'd*, 490 F.2d 563, 571 (5th Cir. 1974); *Schwartz v. Marien*, 37 N.Y.2d 487, 492, 335 N.E.2d 334, 338, 373 N.Y.S.2d 122, 127 (1975) (departure from strict fiduciary standard may be justified where bona fide business purpose indicates best interests of corporation served); see also *Hallahan v. Haltom Corp.*, 7 Mass. App. Ct. 68, 385 N.E.2d 1033, 1034 (1979) (corporate "freeze out" held as not legitimate business purpose).

⁴¹ *Wilkes*, 353 N.E.2d at 663; see Comment, *Corporate Freeze-Outs Effected by Merger: The Search for a Rule*, 37 U. PITT. L. REV. 115, 132 (1975) (authored by C.S. Leeper) (suggested that in marginal situations courts could require majority shareholder to prove that less drastic alternative could have been utilized).

⁴² CLARK, CORPORATE LAW § 18.4, at 799 (1986). The full impact of the strict fiduciary duty as refined, however, remained a concept that other jurisdictions were reluctant to accept. See, e.g., *Comolli v. Comolli*, 241 Ga. 471, 246 S.E.2d 278, 280 (1978) (held that shareholders must act in good faith in all corporate transactions regardless of business purpose); *Lerner v. Lerner*, 306 Md. 771, 511 A.2d 501, 510 (1986) (disorder in close corporation may reach point where business judgment should not be questioned); *Miller v. Magline, Inc.* 76 Mich. App. 284, 256 N.W.2d 761, 769 (1977) (court reluctant to interfere with business judgment; however, exception made when minority shareholder oppressed by majority shareholder); *Zidell v. Zidell, Inc.*, 277 Or. 413, 560 P.2d 1086, 1089 (1977) (adopted "business judgement" rule and majority concept of good faith rather

legitimate business purpose, if any, against the practicability of a less harmful alternative."⁴³

In *Orchard v. Covelli*,⁴⁴ the United States District Court of the Western District of Pennsylvania applied the *Donahue* strict good faith standard and also provided it with an added legal dimension.⁴⁵ In *Orchard*, Robert Orchard, a minority shareholder, brought an action against the defendants⁴⁶ for breach of the fiduciary duty owed to the minority.⁴⁷ The plaintiff alleged that because of his refusal to participate in the defendant's stock redemption agreement, the defendant systematically removed him from all responsible positions in the corporation and denied him benefits in the corporation.⁴⁸ The court found that the relationships in a close corporation are personal in nature⁴⁹

than strict fiduciary duty); *Masintor v. Webco Co.*, 262 S.E.2d 433, 438 (W. Va. 1980) (recognized fiduciary relationship between shareholders in close corporation but declined to adopt strict fiduciary standard because of need for discretion in business decisions). See generally Comment, *The Strict Good Faith Standard - Fiduciary Duties to Minority Shareholders in Close Corporations*, 33 MERCER L. REV. 595, 604 (1982) (noted decision tendered in *Wilkes* as substantial retreat from strict good faith standard primarily because of burden on operation of close corporation).

⁴³ *Wilkes*, 353 N.E.2d at 663. The court in *Wilkes* found that evidence clearly showed that the action taken by the majority shareholders constituted a designed "freeze out" which clearly violated the fiduciary relationship. *Id.* at 664. As a result, the balancing test did not apply because the defendants did not show a legitimate business purpose. *Id.*

⁴⁴ 590 F. Supp. 1548 (W.D. Penn. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986).

⁴⁵ *Orchard*, 590 F. Supp. at 1559. The *Orchard* court, however, failed to recognize the refinement of the strict fiduciary duty, and thus, it applied a more stringent relationship between majority and minority shareholders in a close corporation. *Id.* at 1557.

⁴⁶ *Id.* at 1550. The defendants were the majority shareholder Albert Covelli, the corporations in which the plaintiff had an interest, and the secretary of the corporations. *Id.*

⁴⁷ *Id.* at 1553. The plaintiffs also alleged misappropriation of corporate assets and opportunities, breach of an alleged oral contract, and breach of an employment contract. *Id.* The court, however, found in favor of the plaintiff only on the issue of breach of fiduciary duty by the majority shareholder. *Id.* at 1553-56.

⁴⁸ *Id.* at 1552. In the case, Orchard and Covelli owned stock in seven corporations operating McDonald's restaurants in Erie, Pennsylvania. *Id.* at 1551. Covelli as majority shareholder proposed a stock redemption agreement whereby Orchard, the minority shareholder, would sell his interest in six of the corporations. *Id.* at 1552. Orchard alleged that because he did not consent to the agreement, Covelli used his power as majority shareholder to deny him all benefits in the corporations. *Id.*

⁴⁹ *Id.* at 1557. The court, as have other jurisdictions, realized the similarities between a close corporation and a partnership. *Id.* The court added that it seemed ironic that a close corporation became the "most frequent setting for the exploitation of minority shareholders when the personal relationship [had] gone sour." *Id.* See generally, *Forinash v. Daugherty*, 697 S.W.2d 294, 303 (Mo. Ct. App. 1985) (jurisdictions draw parallels between close corporations and partnerships and impose substantially same fiduci-

and as such, they require a more stringent fiduciary duty of "utmost good faith and loyalty."⁵⁰ The court also recognized the acute vulnerability of minority shareholders in a closely held corporation because of self-dealing by the majority.⁵¹ Self-dealing occurs, the court noted, when controlling shareholders deny the minority shareholders benefits in the corporation.⁵² The court added that any attempt to "squeeze out" a minority shareholder through self-dealing constituted a violation of the strict good faith duty.⁵³ Because of these circumstances, the court also found that the law imposed a fiduciary duty upon the majority when seeking a controlling share to be "intrinsically fair" to the minority's interests.⁵⁴ Most jurisdictions now follow the rule that controlling and majority shareholders owe a fiduciary duty to the minority shareholder particularly in the context of a close corporation.⁵⁵

ary duty).

⁵⁰ *Orchard*, 590 F. Supp. at 1557. The court noted that a strict good faith duty is well recognized between majority and minority shareholders. *Id.*

⁵¹ *Id.* The court found the vulnerability stemmed from the fact that the majority as a controlling interest can dictate the minority in the manner the corporation is operated. *Id.* The court also found the vulnerability attributed to the fact that the shares in a close corporation are not publicly traded thereby diminishing the opportunity for a fair market return. *Id.*

⁵² *Id.* at 1556 (citing *Trans World Airlines, Inc. v. Summa Corp.*, 374 A.2d 5, 10 (Del. Ch. 1977)). The court added that "a majority shareholder had a fiduciary duty not to misuse his power by promoting his personal interest at the expense of the corporate interests." *Id.* at 1557 (citing *United States v. Byrum*, 408 U.S. 125, 138, *reh'g denied*, 409 U.S. 989 (1972)).

⁵³ *Id.* at 1557. The court stated that the exclusion of the minority shareholder is particularly injurious when the minority is not adequately compensated and the squeeze out is "carried out with malevolence or indifference." *Id.* The court added that [t]actics employed against a minority shareholder to effect a squeeze out can take on many forms including generally oppressive conduct, the withholding of dividends, restricting or precluding employment in the corporation, paying excessive salaries to majority stockholders, withholding information relating to the operation of the corporation, appropriation of corporate assets, denying dissenting shareholders appraisal rights, failure to hold meetings and excluding the minority from a meaningful role in the corporate decision-making.

Id.

⁵⁴ *Id.* at 1556 (citing *Arsht, The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 115-16 (1979)). The court added that a corporate policy which has as its objective the denial of benefits to the minority interest does not hold to the "intrinsic fairness" standard and questions the fulfillment of the majority fiduciary duty to the other shareholders. *Id.* See generally Recent Case, 12 U. BALT. L. REV. 565, 570 (1983) (authored by Bryan D. Bolton) (suggested imposition of duty upon majority, when seeking controlling share, may be further justified by inadequacies of statutory remedies in protecting minority interest).

⁵⁵ Note, *Contractual Disclaimer of the Donahue Fiduciary Duty: The Efficacy of*

In the instant case, the court found that because close corporations and partnerships operate with striking similarity,⁶⁶ the relationship of trust and confidence existing in partnerships should be applicable to close corporations.⁶⁷ The court further reasoned that a relationship of trust and confidence applicable to a close corporation creates a fiduciary duty of good faith at all times between persons involved in the affairs of the close corporation.⁶⁸ The court found the

the Anti-Donahue Clause, 26 B.C.L. Rev. 1215, 1216 (1985). Courts, however, have not been consistent in determining the extent of the fiduciary duty between majority and minority shareholders. *Id.*; see, e.g., *United States v. Gates*, 376 F.2d 65, 77 (10th Cir. 1967) (dominant shareholder occupied strict fiduciary relationship to minority shareholders); *Guy v. Duff & Phelps, Inc.*, 672 F. Supp. 1086, 1090 (N.D. Ill. 1987) (majority shareholder had fiduciary duty to offer shareholders highest degree of "honesty and good faith"); *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 276 (Alaska 1980) (adopted duty of "utmost good faith and loyalty" as proper law between shareholders in close corporation); *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 473, 81 Cal. Rptr. 592, 601 (1969) ("inherent fairness" applied to controlling shareholder when it sought to gain advantage in sale of stock); *Zimmerman v. Bogoff*, 402 Mass. 650, 524 N.E.2d 849, 855 (1988) (shareholders in close corporation have fiduciary duty of "utmost good faith and loyalty"); *Smith v. Atlantic Properties, Inc.*, 12 Mass. App. Ct. 201, 422 N.E.2d 798, 801 (1981) (following *Donahue*, court recognized full impact of strict fiduciary duty meant that *all* shareholders in close corporations are held to same standard).

⁶⁶ *Fought v. Morris*, 543 So. 2d 167, 171 (Miss. 1989). The court added that in practical reality, a close corporation may contain directors, managers and shareholders that are all the same persons. *Id.*

⁶⁷ *Id.* The court found that the resemblance of a close corporation to a partnership requires that a relationship of trust and confidence exist between shareholders. *Id.* In tracing the "evolving awareness" in other jurisdictions of both the unique characteristics of a close corporation and the resulting fiduciary duty between the majority shareholders and minority shareholders, the original draft included a discussion of *Singer v. Magnavox*, a decision in which the Supreme Court of Delaware established the requirement of a business purpose in cash-out mergers. *Fought v. Morris*, No. 57,986, slip op. at 7 (Miss. April 19, 1989) (citing *Singer v. Magnavox*, 380 A.2d 968, 978 (Del. 1977), *overruled*, *Weinburger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)). The reference to *Singer* was removed, presumably because Delaware has abandoned the "business purpose" rule of *Singer* for a standard of "entire fairness." *Weinburger v. UOP, Inc.*, 457 A.2d 701, 711, 715 (Del. 1983). As a result, the officers and directors of a close corporation may not blindly adhere to corporate statutes in ignorance of other agreements. *Fought*, 543 So. 2d at 171; see also, *Holmes, The Revised Model Business Corporation Act and Corporate Law Reform in Mississippi: Part Two*, 57 Miss. L.J. 271, 305-15 (1987) (discussing advantages and shortcomings of Mississippi Business Corporation Act as it pertains to close corporations). The court further concluded that *Ross v. Biggs*, 206 Miss. 542, 40 So. 2d 293 (1949), is overruled to the extent that *Ross* differs. *Fought*, 543 So. 2d at 171.

⁶⁸ *Fought*, 543 So. 2d at 171. The court further affirmed the "utmost good faith and loyalty" duty to the discharge of corporate officers. *Id.* (citing *Gibson v. Manuel*, 534 So. 2d 199, 201-02 (Miss. 1988)). The court added "directors and other officers of a corporation . . . occupy a fiduciary or quasi-trust relation toward the corporation and the stock-

good faith standard necessary because minority shareholders are acutely vulnerable in such situations.⁵⁹ The court held that if a "majority stockholder stands to benefit as a controlling stockholder, the majority's action must be 'intrinsically fair' to the minority interest."⁶⁰ Following this analysis, the court held that Morris, as an officer, director, and shareholder, breached his fiduciary to Fought by not following the terms of the stock redemption agreement.⁶¹

Mississippi joined the majority of other jurisdictions by placing a fiduciary duty between majority and minority shareholders in a close corporation.⁶² Rather than rule solely on Morris' breach of fiduciary duty as a director and an officer, the court additionally addressed his fiduciary duty to the minority shareholder in the close corporation.⁶³ Most importantly, the decision provides the disadvantaged and oppressed shareholder a remedy previously lacking in Mississippi statu-

holders collectively" and therefore may not make a profit or acquire personal benefits not available to other shareholders without being accountable to the corporation. *Id.* at 171-72 (citing *Knox Glass Bottle Co. v. Underwood*, 228 Miss. 699, 743, 89 So. 2d 799, 815 (1956), cert. denied, 353 U.S. 977 (1957)).

⁵⁹ *Id.* at 170. The court found that the minority is in a position of potential harm in close corporations such as being dictated and not obtaining fair market values for stock sold. *Id.*

⁶⁰ *Id.* at 171. The court said that the "intrinsically fair" standard of *Orchard* is the "more appropriate" standard and rationale. *Id.* The intrinsic fairness test is one which "imposes the burden of persuasion on the proponents of the merger with careful scrutiny by the court." *Tanzer v. International Gen. Indus., Inc.*, 402 A.2d 382, 386 (Del. Ch. 1979); see also *Arsht, The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 116 (1979) (when self-dealing is shown to exist, presumption of "overreaching arises that can be overcome only by proof of intrinsic fairness"). "Intrinsic fairness" is synonymous with "entire fairness." *Tanzer*, 402 A.2d at 386.

⁶¹ *Fought v. Morris*, 543 So. 2d 167, 173 (1989). The court recognized that punitive damages are appropriate in extreme or special circumstances, but courts should exercise caution when awarding punitive damages. *Id.* at 173; see U.S. For Use and Benefit of Control Systems, Inc. v. Arundel Corp., 814 F.2d 193, 199 (5th Cir. 1987) (breach of fiduciary duty recognized as extreme "circumstance when punitive damages may be awarded"); *Bryant v. Alpha Entertainment Corp.*, 508 So. 2d 1094, 1098 (Miss. 1987) (punitive damages appropriate "only in extreme cases"); *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 465-66 (Miss. 1983) (punitive damages recoverable where breach of contract resulted from gross negligence or intentional wrong). The court stated that the awarding of punitive damages is "within the discretion of the trier of fact." *Fought*, 543 So. 2d at 173; see *McGowan v. Estate of Wright*, 524 So. 2d 308, 310 (Miss. 1988) ("award of punitive damages within discretion of jury"); *South Central Bell v. Epps*, 509 So. 2d 886, 893 (Miss. 1987) (trial judge determines whether punitive damages issue is submitted to jury). The court stated that it would not disturb the trial court's discretion with regard to punitive damages. *Fought*, 543 So. 2d at 174.

⁶² See *supra* notes 24-26, 29, 55 and accompanying text.

⁶³ See *supra* notes 9, 54-55 and accompanying text.

tory and case law. In addition, it may deter those in control of the close corporation from acting in bad faith.⁶⁴

It is not clear if the court, when it found the *Orchard* rationale and standard to be the "more appropriate" standard, is referring to the standard in *Ross* or the standard in *Donahue*.⁶⁵ By directly overruling *Ross*, it is obvious that the court *did* find the *Ross* standard inappropriate.⁶⁶ However, if the court is referring to *Ross*, then it is unclear what role, if any, the stricter standard of "utmost good faith and loyalty" plays in the fiduciary relationship between shareholders in a close corporation.⁶⁷ This may be a cause for concern since a stricter standard may impede the decision making process in a close corporation.⁶⁸

On the other hand, if the phrase "more appropriate" is a reference to *Donahue*, then it appears the court is adopting "intrinsic fairness" as the standard for the fiduciary relationship between shareholders.⁶⁹ If the court chose "intrinsic fairness" to protect decisions made for legitimate purposes, it could have done so by adopting the *Wilkes*' refinement of *Donahue*.⁷⁰ Instead, the court adopted the *Orchard* standard, a standard which incorporated both the stricter standard of *Donahue* without the refinement of *Wilkes* and the standard of intrinsic fairness.⁷¹ Although the court chose to ignore the *Wilkes* decision, as did the court in *Orchard*, it appears that applying an "intrinsic fairness" standard will yield the same result as *Wilkes*.⁷² The failure of the court to draw a bright line between the stricter standard of "utmost good faith and loyalty" and "intrinsic fairness" may be a source of confusion for those applying a good faith standard to shareholders in a close corporation.⁷³

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⁶⁴ See *supra* notes 16, 21-22, 54, 57 and accompanying text.

⁶⁵ See *supra* note 60.

⁶⁶ See *supra* note 50.

⁶⁷ See *supra* notes 37, 40, 58 and accompanying text.

⁶⁸ See *supra* notes 40 and 42.

⁶⁹ See *supra* note 60 and accompanying text.

⁷⁰ See *supra* notes 42, 45 and accompanying text.

⁷¹ See *supra* note 50.

⁷² See *supra* notes 45, 50, 57, 60 and accompanying text.

⁷³ See *supra* note 31.

BOOK REVIEW ESSAY

OF BORK AND BASICS

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE
LAW by Robert H. Bork.* New York: The Free Press. 1990

Pp. xiv, 432. \$22.50

*Reviewed by James L. Robertson***

*We would rather be ruined than changed,
We would rather die in our dread
Than climb the cross of the moment
And let our illusions die*

W.H. Auden, *The Age of Anxiety*

I. RE-ENTER ROBERT BORK

Law is politics, whatever else it may (and should) be, and no name is today more publicly associated with (dissent from) this reality than that of Robert H. Bork, for years a prolific and provocative scholar at the Yale Law School, Richard Nixon's Solicitor General, and a man who served with distinction for seven years as judge on the United States Court of Appeals for the District of Columbia Circuit.

Robert Bork has participated in the politics of law.¹ His

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¹ I had heard of Robert Bork before October of 1973, but only in the sense that a

1971 article in the *Indiana Law Journal* comes readily prominently to mind.² He has been victimized by that same politics. Three days beyond the bicentennial of the Constitution, Bork sat at the vortex of one of the great charter's processes. Convened to consider whether the Senate should advise and consent to a President's nomination of a Supreme Court Justice, the Senate Judiciary Committee instead convened its version of the Roman Circus. Robert Bork, the man Ronald Reagan had sent to scourge the sinners, was fed to the lions. It was a scary spectacle.

Now Bork barks back. He has written a book,³ and in his book he identifies two centuries of constitution changers and with striking rhetoric demands that they be driven from the temple. These and their defenders in the legal academy he convicts of "the political seduction of the law" and leaves no doubt of the sentence they should serve, for these are the snakes who supply the apple. Bork displays erudition and learning with a heavy mix of righteous indignation. The reader risks his own seduction, as Judge Bork's words work their way with those of us who were offended by his ill-mannered detractors.

In 1988 he resigned from the federal bench so that he might "speak, write and teach . . . more freely" (p. 317). *The Tempting Of America* is his first major writing since then. Bork's book appears in three general sections. The first section - The Supreme Court and the Temptation of Politics - focuses upon the Court's constitutional stewardship of its self-created power of judicial review. A second section announces The Original Under-

lawyer tends to know who the Solicitor General is. I became consciously aware of him at the time of what has come to be known as the Saturday Night Massacre, known by all as the night President Nixon decided to fire Watergate Special Prosecutor Archibald Cox. He had instructed Attorney General Elliott Richardson to implement his order. Rather than do so, Richardson resigned his office. Immediately thereafter, Nixon delivered the order to Deputy Attorney General William French Smith who followed suit by resigning. Richardson and Ruckelshaus announced publicly that they were acting under the dictates of principle. Third in command within the Department of Justice is the Solicitor General and the ax was tendered to Robert H. Bork, who promptly wielded it.

² Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

³ R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (hereinafter cited by page number only).

standing (TOU) theory of constitutional interpretation and then summarizes the work of various prominent constitutional theorists, none of whom finds favor. A third section describes the "Bloody Crossroads," the public war over competing theories of constitutional interpretation. Understandably, Bork sees his own failed nomination to the Court the centerpiece of that war, its Waterloo or its Alamo, depending on one's point of view.

Tempting suggests a more complex response. Pervasive is Bork's deep concern over what he sees as the politicization of the law, and it is here that we should begin and end. We address Bork's rather polemical and quite selective rendering of the American constitutional law scene and then move to some general points in his approach that seem quite correct. TOU is the centerpiece, the antidote, what Dr. Bork prescribes for the ills he sees, and we will find that it adds to the health of our view of the constitution in at least two important ways. On other points, I find TOU weak in theory and premises. Surprisingly, its progenitor applies TOU arbitrarily, if not capriciously. I offer specifics, a case study and suggest a rough outline of what seems to my mind a better way. Robert Bork's *exemplar extraordinaire* of our fall from constitutional grace is the right of privacy and he attacks with great fury. I disagree, for I believe the case for a constitutional right of privacy compelling in its own right, or at least as persuasive as other constitutional doctrines Bork is more than willing to endure. I end where we began, and with a word of thanks to Robert Bork for subjecting himself to the fiery trials of law and politics.

II. THE POLITICIZATION OF THE LAW

So much of Judge Bork's book concerns "the politicization of the law" (p. 2) and it is important to understand just what he means. When Bork laments the "massive marches" down Constitution Avenue toward the Supreme Court, "one by anti-abortionists and one by pro-abortionists" (p. 3), Judge Bork is not objecting to the first amendment nor to the particular manner people choose to exercise the rights it secures. His complaint is that the Court has interjected itself into the political arena by

*Roe v. Wade*⁴ and a variety of other decisions and that any problems these marchers might generate may only be seen as self-inflicted wounds, and unnecessary ones at that. Judge Bork believes and stridently asserts "[t]he structure of government the Founders of this Nation intended certainly did not give the courts a political role" (p. 154), and we should consider whether he is right in this.

The Constitution makers may not have intended a political role for federal judges, but its structure gave them one because article III confers upon them great power to affect the lives of people. The content of the Court's political role is and should be the subject of thoughtful and perennial debate, but the fact of its existence is surely beyond question. The day persons possessing and prosecuting such powers are seen removed from politics will be the day I become concerned, for we will be less free than most of us would like. Still, our law has seen a (excessive?, unnecessary?, destructive?) politicization over the years and particularly of late. Before proceeding with the thoughts Bork's book provokes, we need think of what is meant by the politicization of the law. What are its dimensions and contours? What is myth and what reality?

As I have hinted, I do not for a minute think that the judiciary should be secluded or immunized from the real world, nor that citizens should be discouraged from voicing their views of its performance. Those of us who are judges should keep our windows open and from time to time look out and be aware who we strike with the bullets we fire in the name of the Constitution and the law. When courts speak, people are affected and often in important ways. Courts take people's property and give it to someone else. Courts order people to jail, often for extended terms, and on rare occasions decree death. Courts set precedents which when enforced affect the lives of thousands, if not millions. Courts are the ultimate arbiters of the regulatory state. People of right may and should address any instrumentality of the state so potent. The legitimacy of judicial authority and process and performance is a matter inherently political for law is not an end in and of itself but a means to the end of a society in

⁴ 410 U.S. 113 (1973).

which we should *all* want to live.

Beyond these basics there is a problem, and the core of our concern is the phenomenon of judicial discretion. I do not refer to those many instances when the positive law recognizing its instrumental limits expressly vests "sound" discretion in this judge or that. What has troubled us for decades are those hundreds of areas where we have sought by law to tie the hands of our judges so that they may at most *expound* the law but have found that we have failed, that try as we might, we cannot succeed. I refer to the case where legal language is loose, open textured or downright indeterminate so that the judge - who must decide - must exercise discretion. I refer to the case where one seemingly applicable rule points north and another points south, and there is no trump card. I refer to the case where faithful enforcement of the "substantive" law points one way while at once the "procedural" law points the other, and where practice accepts waiver of procedural niceties in the interest of substantial justice, cases where judges have a commission to choose and no ultimate means of choosing beyond their own good judgment. And I refer to the case where the judge confronts the grand generalities of the Constitution that no more cabin the judge's discretion in specific cases than a father's injunction to his son: "Behave honorably."

The existence of this form of judicial discretion is banally obvious to those who will see.⁵ The problem is that so many who see make the quantum leap and assume that any court that does not do to suit them is enacting its (legal) personal political agenda. Too many of us have been bathed in the cynicism of a cynical age, and we refuse to accept any decision we disagree with. We deny the role and reality of process or reason. We see judges as political officers no different from legislators and executives, and we believe courts respond to political pressure the same as these others.

Judge Bork particularly despairs of the politicization of the

⁵ See, e.g., HART, *THE CONCEPT OF LAW* 124-28 (1961) (discussion of judicial discretion); Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 481, 518, 518-62 (1986) (author discusses judicial discretion); Kronman, *The Problem of Judicial Discretion*, 36 J. LEGAL EDUC. 481 (1986)

judicial selection process, a feeling no doubt intensified by his own personal experience. Without regard to how one felt about the Bork nomination or its rejection, I trust all would accept that he was treated shabbily. His views were often distorted and misrepresented.⁶ Whether a judge is before the Senate for confirmation or before the electorate for retention or re-election, people think they ought to form their judgments by lining up their perception of the results; I find this unfortunate for, accepting the inevitability of judicial discretion, judges are charged to accept principles of law grounded in text and reason and faithfully follow those principles where they lead. When one does that, one's judgment does not always suggest the result one would like. We forget that sometimes it is the judge who produces a politically conservative result, e.g., a pro law and order result, and is the one who is bending the law.

Senators and representatives are perceived to vote for results they find pleasing (and, of course, politically palatable to their constituents). Judges are (somewhat) different. We are expected to explain the bases of our decisions and to give the reasons why we made the discretionary choices we have made and to do this in a principled and reasoned and candid and public manner. Judges have less leeway, yet because they have some our people seem unable to accept that we accept any limits. Where we have lost sight of the inevitable ambiguity of all things human. We simply do not know what to do with that ambiguity's imperative for the co-existence of judicial discretion and integrity, for in our "me first" world we have forgotten that loss, disappointment, finitude and even tragedy are inevitable and acceptable and life enhancing parts of the human experience.

The politicization of the law has a related dimension. Not so long ago it was thought improper that a judge declare publicly -

⁶ The California retention elections in 1986 in which the electorate turned out Chief Justice Rose Bird and two other justices of the California Supreme Court were of similar political genre. These make clear that, contrary to the impression Judge Bork's book conveys, the political left has no monopoly on the tactics to which he was so effectively - and unfairly - subjected. See J. GRODIN, *IN PURSUIT OF JUSTICE* 169-85 (1989) (former Justice Joseph R. Grodin's antiseptic account of retention elections is much different in tone than Bork's book).

in advance - how he would decide a given case (p. 10). A judicial nominee should give his philosophy of law, perhaps even discuss the law generally, but pre-confirmation inquiry would center upon his education, experience, competence, work habits, honesty and integrity and the like. We once lived in an age when most people thought most judges would decide most cases alike, regardless of the judge's political persuasion or legal philosophy. We once lived in an age when only the naive and the demagogue thought what a judge had said in advocacy or in academic journals would be taken as gospel as to how, in the exercise of his indisputable judicial discretion, he would vote in specific cases. One's duty as an advocate differs from one's duty as a scholar, and both differ from one's duty as a judge. Not too long ago many thought it irresponsible to support or oppose a nominee for judicial office on the grounds we use in voting for Senator or President - that the nominee's votes or acts once in office will likely be found politically congenial. Single issue support or opposition was unknown.

Still Robert Bork's lament (which in my heart I share) rests on a partially false premise. It springs from a yearning for a view of the law and its processes we know has never fully existed - and can never be brought into being. It requires little knowledge of history to know that political wars have been swirling about the Supreme Court for well over two hundred years. John Adams packed the federal bench just before the Jeffersonians came to power. Andrew Jackson had his famous war with John Marshall, highlighted by Jackson's famous proclamation, "John Marshall has made his decision. Now, let him enforce it!" (p. 28) With less controversy, Joseph Story saw the future of the nation dependent upon the growth of commerce and trade and, blending natural law with public policy, used the law politically and instrumentally to fashion decisions such as *DeLovio v. Boit*,⁷ and *Swift v. Tyson*.⁸ The *Dred Scott*⁹ decision, the dozens if not hundreds of economic regulation and social reform decisions of

⁷ 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776) (expanding federal admiralty jurisdiction).

⁸ 41 U.S. (16 Pet.) 1, 19-24 (1842) (declaring general federal common law).

⁹ 60 U.S. (19 How.) 393, 454 (1857).

the *Lochner*¹⁰ era, not to mention the highly controversial free speech cases of the immediate post World War I era,¹¹ were but a few examples of a continuing politicization of the Constitution and the courts. Substantial historical research has made clear that other courts have felt the political pull.¹²

Efforts to stack the federal bench with those who would enact one's political agenda began with Adams, not with Ronald Reagan, though the latter's administration honed the skill to a fine art. The cry that "things will never be the same" arose after the arduous confirmation hearings regarding Woodrow Wilson's nomination of Louis D. Brandeis to the Court. Rejected nominations include Herbert Hoover's choice of Judge John Parker in the 1930's, and in more recent times, Judge Abe Fortas, Clement Haynesworth and Harold Carswell. One can read history, forgetting for the moment that historians (even legal historians) seldom write about private law adjudication, and wonder if there were ever a time when the Supreme Court was not in politics. There is some truth to the notion that the Court is in politics only when it is seen doing the bidding of those with whom one disagrees.

We must approach a book like Bork's with our guard up and our eyes open. The reality that we must keep in mind is that, while the other two branches - the executive and the legislative - have been wholly political, often in the most positive sense of that term, courts are inherently lodged within the tensions of ambiguous roles. The Constitution, the system and the milieu in which they work demand at once decision of the case at bar and articulation of general principles. The problem is that these are two very different functions and while the first may often be done non-politically, the second may not.

¹⁰ 198 U.S. 45, 48 (1905).

¹¹ See, e.g., *United States v. Schwimmer*, 279 U.S. 644, 653 (1928) (woman denied naturalization because would not take up arms in defense of America); *Abrams v. United States*, 250 U.S. 616, 623-24 (1919) (communist revolutionaries convicted for distributing pamphlets); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (Schenck convicted for distributing literature resisting draft).

¹² See, e.g., O. HOLMES, *THE COMMON LAW* 1, 35-36 (1881) ("felt necessities of the time" have shaping influence on law); HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) (politics changed common law).

Since the Supreme Court renounced appeal of right and moved to certiorari jurisdiction, this latter role, the enunciation of general principles, has become preeminent and the Court's role has been infinitely more political. To state the obvious, the Court does not grant certiorari to correct errors below. The error correcting function has been almost wholly delegated to the courts of appeal. How could anyone see a decision on a petition for writ of certiorari as anything other than an inherently political decision? Robert Bork, however, tells us the Supreme Court has no political role. The decision to grant certiorari is one to place before the Court a question of interpretation of federal law, an interpretation which will inevitably have the effect of amending law - often constitutional law - as it has previously existed. Each decision by its very nature will affect the public policy of the nation, and this is so whether the justices are motivated by consideration of public policy or see themselves acting upon neutral principles. While decisions will always look more political from the outside, and particularly will they look more political to the non-legal external observer, from within as well, each decision has a substantial political component. And if this be so, what is so new and terrible about the disclosure of the politicization of the law?

There is another dimension to the point. We have a passion for simplicity in our society. When simplicity and truth coincide they produce great power and beauty. We think of $E = mc^2$, of the Gateway Arch, of the Gettysburg Address, and of the Vietnam Veterans Memorial. Still there are those who play upon our mental laziness, our tendency to intellectual atrophy, and none more so than the ever present commercial television and USA Today. Bork's book feeds our fetish for the simple.

He persistently presents us false dichotomies, for example: "Either the Constitution and statutes are law, which means their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win" (p. 2).¹³ But there are few either/or's in today's legal world.¹⁴ Some phenomena are not simple, and we do

¹³ See ELY, *Democracy and Distrust* (1980) (one response to false dichotomy).

¹⁴ I develop typical examples in my concurring opinion in *Thornhill v. System Fuels*,

not advance the ball when we insist upon simplicity at the cost of truth. Robert Bork assumes away a complexity within our legal process, complexities which take the form of paradox and ambiguity, each at least two-fold. Each disturbs us. Each tests our maturity as lawyers, our fidelity to law.

Paradoxically, our judges can, do and must legislate, though they be constitutionally enjoined from such. They can, must and do legislate "*ex post facto*" though they be similarly enjoined.¹⁵

Ambiguously, our judges are condemned to legislate and to continue to legislate, a function inherently and everlastingly at great tension with that function constitutionally imposed on them - to adjudge. When courts legislate they do so out of a mode, the adjudicative mode, deliberately designed to deprive them of facts and ideas they need to legislate competently, for it is a mode designed to keep them from legislating, from doing that which they must do.

Bork's book arrives amidst much popular dissatisfaction with the administration of justice. Many perceive that the law obstructs pursuit of legitimate ends it ought to serve. Judge Bork focuses upon the instances when the Court thwarts the will of majorities, whether expressed through the democratic process or the Gallup poll. I do not doubt the existence of this dissatisfaction although I find it largely rooted in false hopes, misunderstandings, and self-centeredness. All of this is not cause for despair, we need to know all that can be known about the processes of our law, including their inevitable, if not inherent, partial politicization. We need to be open to the possibility that part of what we think of our law may be myth, and mischievous myth at that. A doctor may more successfully diagnose and treat a patient as his understanding of human anatomy and physiol-

Inc., 523 So. 2d 983, 1003-107 (Miss. 1988). More controversially, Ronald Dworkin proclaims the "false dichotomy of finding and inventing law." R. DWORKIN, *Law's Empire* 228 (1986).

¹⁵ Recent Supreme Court decisions have expended much effort on this issue. See *American Trucking Ass'n v. Smith*, 110-S. Ct. 2323, 2333 (1990) (no retroactive applications); *Teague v. Lane*, 489 U.S. 288, 296 (1989) (no retroactive application of collateral review case); *Griffin v. Kentucky*, 479 U.S. 314, 328 (1987) (rule on conduct of criminal prosecutions applied retroactively); *Thomas v. State*, 517 So. 2d 1285, 1293 (Miss. 1988) (Robertson, J., dissenting) (adherence to presumption of retroactivity is best hope against judicial activism).

ogy becomes perfected. And so of a doctor of our law.

The matter is of some urgency. I refer to the debate raging regarding the role of the judiciary, a debate to which Bork has been a participant for some time. Persons on all sides are forming judgments, casting ballots and taking other action on the assumption of the truth of premises demonstrably false. Because of our blinders, we blunder into incorrect judgments and bluster forth unjust and destructive condemnations, all of which frustrate our ability to improve our legal system and adapt it to the better service of the complex and often conflicting ends of an ever changing, pluralistic, and fractured society. The debate should rage, but if it is to be productive, it should rage by reference to reality.

I suggest that, arising out of the Bork and Rose Bird experiences, our concern ought be the form and stridency the politicization of the law and Court have taken on in recent years. While no perceptive observer may deny the political side of the law, I think it sad that so few give any credence to principle and process, which are after all our only hope for even handed justice over time.

III. BORK'S BOOK - IN A NUTSHELL

Robert Bork would depoliticize the law. He would take the Court out of politics, and his general prescription is that courts return to the integrity of process and of neutral, principled and non-result oriented adjudication. But even Robert Bork admits that the constitution requires more than mere exposition; it requires interpretation. While there may not be very many practical problems with the reading of the requirement that the President be thirty-five years of age,¹⁶ there are other principles in the Constitution which are quite vague, general, open textured, ambiguous and on occasion, downright contradictory. What is one to do when one good strict constructionist like Robert Bork defends judicial interpretation of the "negative commerce clause to forbid states the power to impose burdensome regulations on

¹⁶ See POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION*, 219 n. 14 (1988) (would allow literal interpretation); ELY, *DEMOCRACY AND DISTRUST* 13 (1980) (same).

interstate movements of trailer-trucks" (p. 168), when another good strict constructionist, Justice Antonion Scalia, is telling us the opposite and that "whatever it is that we are expounding in this area, it is not a constitution?"¹⁷ Laden within the Constitution is the Madisonian dilemma of how to protect minority rights in a society committed to democratic majority rule (p. 139). A citizen's complaint¹⁸ may command an adjudication, and when that complaint asserts a right said to be secured by the Constitution, the judicial process generates an imperative for interpretation. Bork acknowledges that constitutional interpretation is more than a matter of merely feeding the data into a computer which electronically applies the Constitution to yield a sum certain. Because we must have interpretation, it becomes a matter of some real importance how we go about it. This "how" is the central concern of Bork's book. His answer, the theory of TOU is the only tolerable strategem for judicial interpretation of the constitutional text, or so we are told.

The reason the point is so important is that within the American federal system, an unelected federal judiciary whose members enjoy what is essentially life tenure exercise the power of judicial review.¹⁹ Correct interpretive methodology becomes most critical when the constitution is invoked to call into question the action of a democratically elected congress or state legislature. Judge Bork is unequivocal in saying that any judge who interprets and applies the Constitution in the performance of this review function by reference to any criteria other than TOU is acting illegitimately, i.e., is substituting for the Constitution his own purely personal notions of public policy or, in Bork's pejorative, is "out of control" (p. 73, 169). Because of life tenure²⁰ and judicial review, our end is to imprison the judge, to limit the leeway within which he may interpret and decide.

¹⁷ *American Trucking Assn's, Inc. v. Smith*, 110 S. Ct. 2323, 2344 (1990) (Scalia, J., concurring).

¹⁸ *FED. R. CIV. P.* 8.

¹⁹ Bork is by no means the first to note the point, or be concerned about it. *See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY* 84-85 (1977) (whether law should be made by elected officials).

²⁰ One wonders whether Judge Bork would press his views so persistently in the case of judges who are elected or are subject to retention elections.

Following an introductory polemic, Bork gives us a once-over lightly of American constitutional history, the point of which I gather is that the Supreme Court under Chief Justice Earl Warren was not the only court to offend TOU and thus fall into fallacy, although that Court was surely our most proficient sinner. He begins with the early days of the Court leading up to the tragic decision in *Dred Scott v. Sanford*²¹ - the first case where the Court used substantive due process to distort the Constitution (pp. 31-32). Bork then leads us through the Lochner²² era up through and including the New Deal and condemns the Court for reading its notions of liberty of contract into the Fifth and Fourteenth Amendments and thus to invalidate much social and economic reform legislation. It is worth noting, perhaps parenthetically, that the Court would have been acting just as politically had each of these cases gone the other way.

Entering the modern era, Judge Bork accepts *Brown v. Board of Education*,²³ albeit on grounds other than those stated in the opinion, but not much else that came out of the Court under Chief Justice Warren. The year 1969 brought Warren Burger to the Court and most observers think that the Court began to put on the brakes and that, since the appearance of Chief Justice Rehnquist, the Court has taken a decided turn to the right. Judge Bork assures us that this is not so. "These things are simply not true. We have become so used to a left-liberal court that any move toward the center is immediately proclaimed a right-wing threat to our basic liberties" (p. 126). He then cites *Texas v. Johnson*,²⁴ *Sable Communications of California, Inc. v. F.C.V.*,²⁵ *County of Allegheny v. A.C.L.U.*,²⁶ and *Texas Monthly, Inc. v. Bullock*²⁷ as "clear" evidence that "the drive of judicial revisionism has by no means ended" (p. 128).

By this point in the book, one wonders of the author's ob-

²¹ 60 U.S. (19 How.) 393 (1857).

²² *Lochner v. New York*, 198 U.S. 45 (1905).

²³ 347 U.S. 483 (1954).

²⁴ 109 S. Ct. 2533 (1989).

²⁵ 109 S. Ct. 2829 (1989).

²⁶ 489 U.S. 1 (1989).

²⁷ 109 S. Ct. 890 (1989).

jectivity. The man who in later pages will complain so bitterly at the invective, false characterizations and deliberate misrepresentations used against him in 1987 has treated us to a litany of the same. I am not particularly offended at the suggestion that the Warren Court engaged in "unprincipled activism." I happen to accept that view, although I am not sure we would agree on the particulars. Still, it strikes me unprincipled to imply as Judge Bork does that all activism is unprincipled.²⁸ Judge Bork goes on to tell us that the Court has become "a naked power organ," (p. 79) a curious phrase he borrows with relish from Professor Herbert Wechsler of Columbia, and that the Court has become merely a tool of an intellectual elite, applying its own values to promote a left-wing political agenda. I gather Judge Bork thinks the Court has done a few things right in its history, but he doesn't bother to tell us of any of these.

A special place in hell is reserved for the right of privacy and, particularly, *Roe v. Wade*.²⁹ Beginning at page thirty-two, Bork has linked *Roe* with *Dred Scott* and *Lochner* and by page 116 he has decided it has a nice Tinker-to-Evers-to-Chance sort of ring. Indeed, after first giving us "*Dred Scott, Lochner* and *Roe*," Bork writes, "Lenin is supposed to have written: 'Who says A must say B? In that he was logically correct. Who says *Roe* must say *Lochner* and *Scott*? (p. 32). I would be the last to deny that there are problems with *Roe*. Reading the trimesters of pregnancy into the constitution strikes me as odd, but to utter *Roe* in the same breath with *Dred Scott* and *Lochner* is a bit much. Is this not the same sort of demagoguery Bork complained so bitterly about when it was used against him?"

Judge Bork explains how and why the Supreme Court has failed to achieve the grace *TOU* affords. He concludes, no doubt to the surprise of many, that none of the nine present³⁰ members

²⁸ Anecdotal observation over the years leaves me convinced that those who complain of activist judicial legislation are for the most part far more concerned about the content of that "legislation" than the fact that the Court has legislated. I hear few complaints from those who find the Court's activist legislation congenial to their notions of what should be.

²⁹ 410 U.S. 113 (1973).

³⁰ Bork's book was written after the confirmation of Justice Kennedy and prior to the retirement of Justice Brennan.

of the Court are eligible for entry into the kingdom (pp. 126-28, 240). En route, Bork trashes many judges long thought advocates of judicial conservatism or restraint, such as the second Justice Harlan (pp. 231-35). We are forbidden to invoke common understanding of the work of these judges because we have been so duped by elitists, left wing liberals and judicial activists, we don't know real judicial neutrality when we see it.

Judge Bork moves next to the academics and summarizes the views of many of the leading ones and dispatches each to the nether regions. As I was reading along and following my usual practice of looking ahead on occasion to see what was coming, I noticed a separate chapter on today's conservative legal academicians and intuitively thought "He's going to say nice things about these people." But not Robert Bork; the leading conservative academicians of the moment are damned as well.³¹ All of this is before the reader when he encounters Bork's mention of "the most entertaining aspects" of the work of today's legal theorists, "Each of the moral-constitutional theorists finds the theories of all the others deficient - and each is correct, all the others, as well as his own, are deficient" (p. 254). If that were all, I would cite the familiar *Pot v. Kettle* and leave it at that. Judge Bork, however, not only declares that everyone else is wrong and that he is right, he says that this is eternally so. For instance, he states: "No such argument [as one that disagrees with TOU] can ever succeed" (p. 13, 193). Later he writes: "[n]o matter how tirelessly and ingeniously the theorists of constitutional revisionism labor, they will never succeed. . . ." (p. 259). Robert Bork is not a bashful man.

Particularly revealing is Bork's condemnation of Professor Ronald Dworkin who holds the Chair of Jurisprudence at Ox-

³¹ One curious omission is Judge Richard A. Posner. Bork cites a few of Posner's comments on the work of Laurence Tribe, but these are rather innocuous, and then he is silent. To be sure, at the outset Bork says he hopes that no one "will be offended at being left out, but the theorists are so many that it is possible to look at only a representative sample (p. 187). Still Posner is without doubt the most prolific and surely one of the more influential legal theorists in America today. Bork talks of Tribe only because Tribe is so "prolific" and "the press have made him a force to be reckoned with" (p. 199). But if Tribe satisfies these criteria so does Posner, and more so. The omission is odd. Posner gives Bork modest mention in his latest work. POSNER, *The Problems of Jurisprudence* 305-07, 428-29, 451 (1990).

ford University in England, which just may be the most prestigious academic position in the world of Anglo-American law. One does not ascend this chair without having done something right. In point of fact Dworkin has spent the better part of the last twenty-five years defending the values Bork insists he cherishes: those of fidelity to text, principled decision-making, judicial impartiality, and the like. Dworkin begins his latest book, "It matters how judges decide cases,"³² and proceeds to articulate a theory of judicial restraint I would think most traditional and conservative jurists would find quite acceptable. I find sentences sprinkled throughout Bork's book that could have been lifted almost verbatim from Dworkin's work (p. 163). During his career, Dworkin has been subjected to constant attack bordering on abuse from the left. For his defense of the integrity of the judicial process Dworkin has even been labeled that most dreaded of academic epithet - "a formalist."³³ But Bork says of him: "Dworkin writes with great complexity but, in the end, always discovers that the moral philosophy appropriate to the Constitution produces the result that a liberal moral relativist prefers" (p. 213). He further writes, "Dworkin's constitutional theory is perfectly congruent with the political positions of modern liberalism in its more extreme varieties" (p. 214). No one discredits Robert Bork as effectively as Robert Bork.

IV. LEGAL POSITIVISM, PRINCIPLED ADJUDICATION, THE CRITERIA FOR LEGAL VALIDITY, AND OTHER HOPEFUL SIGNS

These things said, there are many features of Judge Bork's work that I find quite congenial, and important ones at that. First and foremost, Bork is a legal positivist and he damns to hell those who are not. I concur in that judgment. He condemns the natural law reasoning of Justice Samuel Chase of Maryland, the occasional lapses of Chief Justice Marshall and certainly the excesses of the *Lochner* era Court. Curiously lauded is Joseph Story, who at times was a proponent of natural law³⁴ and later

³² R. DWORKIN, *supra* note 14, at 1.

³³ See, e.g., Abernathy, Book Review, 73 GEO. L.J. 1499, 1541 n.244 (1984-85) (characterizing Dworkin as a "formalist").

³⁴ See DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT, 404-09

and more often at loggerheads with the Jeffersonians and ever in favor of a strong, centralized federal government. Bork accepts the view best put by Holmes when he said, "The common law is no brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that may be identified."³⁵

And later "There is no mystic overlaw to which even the United States must bow."³⁶ Law is a social fact and nothing more; that is, all the law that our courts ought to enforce is but social fact.

James Madison said the Constitution "must speak for itself,"³⁷ and to that end a court's interpretive venture must begin and end with the text. I gather Judge Bork accepts this view. I agree as well. The reading a court gives a rule of law must answer to what Dworkin has called the "dimension of fit."³⁸ It must fit the objective text - be it constitution, statute, administrative regulation, procedural rule, or whatnot - and not some other text the judge may wish were before him. I accept that it is a judicial sin of significant proportions that a judge manipulate a text to achieve an interpretation not fairly encompassed within the language of the text (although merely reading the language is certainly not all there is to legal interpretation). No process is more demanding than the judge's lonely pursuit of the best interpretation a legal text may bear.

Throughout his book, Judge Bork makes clear that he regards as anathema the attitude that judging should be fact-specific. I gather that he, like I, thinks judges who try to limit their decisions to the facts of the case should be shot at dawn (p. 136).³⁹ At issue is nothing less than that ideal, so unattainable, even seemingly trite, but infinitely worth pursuing: that we be a government of laws and not men. The law at its best may yield

(1970) (discussing Justice Story's view on natural law); WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* at 290-91, 296-97 (1931) (Justice Story invoked "natural reason" language with regularity in his opinions).

³⁵ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

³⁶ *The Western Maid*, 257 U.S. 419, 432 (1922).

³⁷ Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 936 n.261 (1985).

³⁸ R. DWORKIN, *supra* note 13, at 230.

³⁹ I have always enjoyed Justice Owen Roberts' barbed insight that decisions confined to their facts are like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

but a crude approximation of justice, and we act on principle when we decide like cases reasonably alike and hopefully hold the injustice we inflict to a tolerable minimum. I agree with Bork's agreement with the writings of others that cases must be decided on principle. This means that the principle necessarily embedded in today's decision must be one the judge is prepared to apply on another day to another case which he cannot honestly distinguish, but where the substantive result may be one he finds abhorrent (p. 78).

There are the simpler virtues. Most of us passionately wish that the system should function so that a case will be decided the same way no matter who the judge is. We revere (if we do not always practice) the virtues of judicial neutrality, impartiality and independence. It is drummed into our heads in law school that the law is no respecter of persons, although our cerebral soils have been prepared long before. If judges do not respect this ideal, no one else will.

Still, on points where I think Bork is right, his language is often sloppy. Bork's approach to legal validity is a case in point. Thirty years ago H.L.A. Hart re-attracted our attention to the centrality of the concept of legal validity.⁴⁰ It has since been common ground that efforts such as Bork's must confront the question - what counts as the legal materials and, perhaps more importantly, how do we know what counts as the legal materials? Judge Bork tells us that materials "become law because they are made in ways that the people of this nation assume to be ways of making law" (pp. 173-174). Bork continues, "It is necessary to any polity that there be ground rules or assumptions that identify certain propositions as laws if they are produced in certain ways" (p. 174). I certainly agree, but if TOU is to succeed, the idea needs a bit more attention than Bork gives it.

With a few, but important, exceptions (to be noted below) what counts as law, and becomes social fact is only that which satisfies Hart's criteria of legal validity (CLV). Those criteria are two-fold: 1) did the person or persons who made the rule, by virtue of some other valid rule of law, have authority to make

⁴⁰ H.L.A. HART, *supra* note 5, at 97-107.

the rule? 2) assuming the person or persons had authority, i.e., jurisdiction, did they make the rule in accordance with the procedures specified by other valid rules of law?⁴¹ We must attend both to the existence of law-making power and, as well, to its right exercise. These criteria are critical for all forms of law. By the forms of law, I mean the public law, such as constitutions, statutes, common law, administrative regulations and also such forms of privately made law as corporate charters, collective bargaining agreements, contracts, trusts and wills. The CLV must be met in the case of each rule (of whatever form) that is to have the power to generate rights that persons may demand the state and its citizens respect and enforce.

If a man dies and we ask whether his will is valid, we must first ask whether when he made the will he was over a certain age and was of sound and disposing mind, memory and understanding. If we answer that question in the affirmative, we then ask, did this person who had by law been empowered to make the will, act in conformity with the procedural requisites for so doing?⁴² And to this end, we ask whether the will was in written form, whether it was subscribed by the testator at the end, and whether it was properly witnessed, in other words, whether it complied with the various formalities the law insists upon before a will be given effect.

The rules regarding the identification of persons with legal power to make wills, contracts, statutes and constitutions and prescribing the procedural formalities requisite to each are customarily in written form. The case of statutes is illustrative. A bill becomes law when it follows a certain procedural course and is enacted by the requisite majority of each house of the Congress or the state legislature, as the case may be, and when it is approved by the President or the governor.⁴³ Only that which has received these approvals acquires the status of law. No one

⁴¹ Hart calls these criteria "secondary rules," or sometimes "secondary rules of recognition." H.L.A. HART, *supra* note 5, at 91-96.

⁴² *Cf. Williams v. Mason*, 556 So. 2d 1045, 1048-49 (Miss. 1990) (listing procedural requisites for contracts to bequeath property by will).

⁴³ See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 956-57 (1983) (House of Representatives resolution ordering deportation of alien declared unconstitutional because not passed by Senate or signed by President).

votes for "legislative intent." The chief executive approves no unwritten expression of legislative intent, and his approval is essential to the validity of the statute - a point we often overlook. No court charged with interpretation may with legitimacy resort to notions of legislative intent except insofar as that intent may have been expressed in the written words upon which the lawmakers do vote. Nor do legislative committee reports, floor debates, and the dozens of other items comprising the political history of a statute emphatically bear the imprimatur of legal validity. There is much mythology afoot about statutory interpretation and few ideas are as potentially pernicious as setting aside the text and acting by reference to materials, e.g., legislative intent, legislative history, that do not enjoy the status of law. The meaning of law may legitimately be drawn only from those materials satisfying the CLV. Bearing in mind that we have chosen the vessel of the written word to express the directives of law, we must sail those vessels as ably as we may.

In any legal system we come at some point to fundamental rules that may not be validated by reference to other empowering rules. These rules have force and effect in our courts and in our country because they are accepted and not because we can prove them law.⁴⁴ The concept of acceptance is the cornerstone of the reality that our law is nothing more than a social fact. And we must never forget that it will remain a social fact only so long as it subscribes to what Holmes called "the first requirement of a sound body of law," that is, "that it should correspond with the actual feelings and demands of the community, whether right or wrong,"⁴⁵ for we as no others have experienced that moment in the course of human events when we should alter the social fact. With some temerity I suggest the continuity of our acceptance turns in substantial part upon our courts acting in accordance with those rules and principles which may be CLV validated. This is the way many people think courts ought to act. It reflects a value judgment they think should be respected

⁴⁴ See H.L.A. HART, *supra* note 5, at 105. Our Constitution is law because it has been ratified according to procedures agreed upon by persons who had the authority to so agree and because today we accept that process.

⁴⁵ O. HOLMES, *supra* note 12, at 41.

and corresponds with the actual feelings and demands of most of us most of the time.

We have another point of agreement. Judge Bork argues that a judge must begin "from recognized legal principle" - the CLV-sanctioned constitutional text - and "reason [. . .] in an intellectually coherent and politically neutral way to his result" (p. 2). This leads to the third type of rule a court must meet on the road to enforcement - rules of interpretation. This type of rule addresses the question, how do we read the will? The contract? The constitution? In the case of a will, what are the ground rules for interpreting the text the testator has provided us? A search of the case law of almost any jurisdiction will reflect a fuzzy combination of "we search for the intent of the testator" coupled with "We interpret the words according to their common and ordinary meaning," with few persons realizing that these are not always the same thing.⁴⁶

The point for the moment is that there is this third category of secondary rules, rules specifying interpretive stratagems, and these rules as well must survive CLV scrutiny. At times these rules are found in statutes, particularly when legislators desire to dispatch that ultimate instance of judicial arrogance - the rule of interpretation that statutes in derogation of common law must be strictly construed.⁴⁷ More often there are no constitutionally or statutorily mandated rules of interpretation and in such cases judges must write the rules. When they do so, the questions arise, whence the judge's authority and what are the criteria for its right exercise? I have no serious doubt that the judge receives his authority from the force of his commission coupled with his exercise of the judicial power vested in him via the constitution of his jurisdiction. The criteria for its exercise begin, in my view, with Dworkin's dimensions of fit and justification but include more, as will presently appear.

What is important is that we understand that the judge must interpret, and this is so though not one word in the Consti-

⁴⁶ See *Tinnin v. First Bank of Mississippi*, 502 So. 2d 659, 663 (Miss. 1987) (testator's intent given effect only if expressed in will).

⁴⁷ The Mississippi Worker's Compensation Law "shall be fairly construed according to the law and the evidence." Miss. CODE ANN. § 71-3-1 (1972).

tution or any statute may expressly confer upon the judge the power to announce and enforce rules of interpretation. The best that may be said of the judge's authority to interpret the Constitution is that the authority resides within the phrase "the judicial power." In Borkian phraseology the authority is "a necessary inference from the structure of government apparent on the face of the Constitution" (p. 155). If one not trained in the law but who had read Judge Bork's book were suddenly cast in the posture of interpreting a holographic will, he might well gag at the prospect of reading an ambiguity because no provision of the text of the Constitution and no materials qualifying under TOU reflects what was originally understood by the phrase "the judicial power." But the judge would still have to decide the case.⁴⁸ He would have to rule for the proponents or the contestants or among competing beneficiaries, as the case may be. It may well be that the judge imbued with TOU would say "I have no authority to resolve this ambiguity; therefore, I find for - whoever - on the basis that the contesting beneficiaries have not established their claim." But that in and of itself is an interpretation which produces a concrete result that *someone* gets particular assets passing under the will. The point is a simple one. Courts must decide and en route to decision they must interpret however much they seek to avoid interpretation, a point of which I will say more below.

V. TOU: THE STRONG PARTS - OBJECTIVE INTERPRETATION OF THE RATIFIERS' TEXT

Just what does Judge Bork mean by "The Original Understanding"? Preliminarily, it might be noted that persons who talk in this sort of terminology usually use language like "the intent of framers" and have in mind searching out the minds of those who drafted the Constitution and the particular amendments thereto. They search for what Ronald Dworkin calls the "speaker's meaning"⁴⁹ when interpreting the written word. They accept at the constitutional level the myth of legislative intent.

⁴⁸ See, e.g., *Estate of Bunch v. Heirs of Bunch*, 485 So. 2d 284, 285-86 (Miss. 1986) (construing vague language in will).

⁴⁹ R. DWORKIN, *supra* note 14, at 317.

From time to time I even hear persons talk of what Thomas Jefferson meant by a particular clause in the Constitution, although it is a rather well documented fact that Jefferson was in Paris in the summer of 1787.

Judge Bork eschews any such notion and, indeed, insists that he is not searching for any subjective intent. He has deliberately chosen the phrase "The Original Understanding" with the emphasis on *understanding* in contradistinction to intent. He suggests, for example, that, should we discover a heretofore unknown letter from George Washington to Mary explaining his understanding of particular wording in the Constitution, that would change nothing (p. 144). Though Washington was chairman of the convention, his subjective thoughts are per se irrelevant to the interpretation of that clause.⁵⁰

Judge Bork moves us beyond the simple minded framers' intent view in two important respects. First, he insists that our focus should be upon the *ratifiers* of the Constitution, not the *drafters*.⁵¹ He is on target. Those who drafted the Constitution and signed it in September of 1787 presented us with a piece of paper wholly without any legal effect. Under no view can it be said that the actual draftsmen had authority to infuse legal power into that document. The delegates had done nothing satisfying CLV. Indeed, there is quite a bit of evidence that those who met in Philadelphia in 1787 greatly exceeded their authority. On the other hand, the several ratification conventions among the original states did act out of accepted legal authority and did turn the piece of paper labeled the Constitution into a law.⁵² The ratifiers enjoyed the authority to confer legal validity

⁵⁰ Drawing upon Holmes, I have often insisted that, "I for one am not nearly so interested in what the parties intended as in what they said." *Thornhill v. System Fuels, Inc.*, 523 So. 2d 983, 1007 (Miss. 1988) citing Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897). And in the case of statutes our concern is with what the statute means, not what the draftsmen meant. *Denley v. Peoples Bank of Indianola*, 553 So. 2d 494, 499 (Miss. 1989) (Robertson, concurring); *Stuart's, Inc. v. Brown*, So. 2d 649, 651 (Miss. 1989); *Mississippi Ins. Guar. Ass'n v. Vaughn*, 429 So. 2d 540, 542 (Miss. 1988), quoting HOLMES, *Collected Legal Papers* at 207 (1920).

⁵¹ Of course, some who were ratifiers had earlier been drafters.

⁵² Bork suggests there are those who deny that the Constitution is "law." (pp. 8, 171-76). This is an example of a most distracting feature of his book: selecting a "straw man," having him take a ridiculous position (like "the constitution is not law") and con-

upon the constitution. Their authority may be identified and confirmed by the processes under which they were chosen and commissioned.⁵³ Bork is correct to insist that we look at the actions of the ratifiers, not the draftsmen, for this only conforms to the right understanding of the concept of legal validity.

Second, Bork directs our attention to "the objective meaning that constitutional language had when it was adopted" (pp. 144, 218). He insists that we begin with the text and interpret it objectively. Meaning must be found in the language used and not in some problematical, if not vain, search for what the draftsmen intended. I could not agree more.

This being so, it is rather disconcerting to encounter so much inconsistent phraseology. Consider, for example, "what the ratifiers of the fourteenth amendment had in mind," (p. 66) "the intention of those who made the law" (p. 81), and "the principles the lawgivers intended" (p. 163). The worst is Bork's injunction that we not enforce the Privileges and Immunities Clause of the Fourteenth Amendment because "we do not know what the clause was intended to mean" (p. 180), a point to which I will return. In his concluding chapter, where the reader would expect care and precision in expression, Bork enjoins that we reshape constitutional doctrine "[T]o ensure that the principles intended are those which guide and limit power, and that no principles not originally meant are invented. . . ." (p. 352). These phrases hardly call to mind thought of the objective meaning of the constitutional text. To the contrary, they allow us to slide back in to our comfortable habit: "Just what was George Washington thinking?" In Bork's principal exposition of TOU, we find "Nor would the subjective intentions of all the members of a ratifying convention alter anything" (p. 144). He is right. But twelve lines later, Bork cites Madison for the proposition that "what mattered was the intention of the ratifying con-

victing the rest of us via guilt by association. But then, what good lawyer fails to practice a like play from time to time, for the "straw man" and "guilt by association" are among the most telling tricks of the trade.

⁵³ Candor requires inclusion of Hart's idea of the role of community acceptance noted above. The amended constitution has enjoyed continued legal validity because the nation has accepted that its several parts have been proclaimed in ways we have found acceptable, i.e., ratification by those claiming the authority to ratify.

ventions." Bork's book needs at least one more good careful edit.

Bork's carelessness of expression bears a substantive dimension. I dare say that a judge who for whatever reason wanted to be a disciple of Judge Bork, and who reads *Tempting*, will find many expressions that may lead him to think that he should (try to) interpret the Constitution according to the original intent. The several instances noted above where Bork uses "intention" language are but a few of many. It is ultimately quite important whether we accept as dominant a search for an objective or a subjective meaning within the Constitution. Perhaps we may offer no irrefutable proof that one stratagem is superior to the other. What is certain is that failure of consensus regarding a dominant stratagem, objective or subjective, will lead to that most unfortunate of experiences within a legal system - varying and inconsistent interpretations and applications of the Constitution.⁵⁴ What this means is that the Machiavellian revisionist whom Bork despises has available two stratagems and may accept whichever promotes his agenda. The careless disciple will turn to one page of *Tempting* one day and another the next, with the same disconcerting effect on our lives. If our purpose is to rein in judges' discretion, to limit the leeway within which they may interpret and decide, we must opt for a single interpretive stratagem, and stick to it.

But ignoring these irritations, I take Bork at his (predominant) word that he desires the Constitution be read objectively. In this he advances the ball but leaves us short of the goal. Bork introduces another bit of fuzziness regarding the contrast between what the ratifiers understood and what the public understood. At one point Bork asserts, *seriatim*, "What the ratifiers understood themselves to be enacting must be taken to be what the public of the time would have understood the words to mean. . . . When lawmakers use words, the law that results is what those words ordinarily mean What counts is what the public understood" (p. 144). No great linguistic sophistication is required to realize that these are hardly three ways of saying the same thing. Bork then compounds the confusion by saying TOU

⁵⁴ Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. COL. L. REV. 111, 120 (1988).

"[I]s manifested in the words used and in secondary materials, such as debates at the convention, public discussion, newspaper articles, dictionaries in use at the time, and the like" (p. 144).

I am satisfied Judge Bork is serious (and correct) when he says we should search for an objective meaning and, if we accept that TOU is what we should seek, I think he is right in suggesting that we begin with the words used and consult every source available at the time, ranging from debates at the ratifying conventions to newspaper articles to dictionaries to "the like." The problem with TOU in *Tempting* is that we are afforded no clue of the weight to be assigned each such source. Inevitably the quality, quantity and credibility of our sources will vary from clause to clause. We are not told any rules of priority in the case of sources suggesting conflicting meanings. What do we do if we have a major question of constitutional interpretation and we consult all of the sources Judge Bork suggests and we find that there is no conclusive answer?

An example is Bork's treatment of the Equal Protection Clause. He accepts that the level of generality we assign it is a question "of crucial importance" (p. 148). Does the clause decree black equality, or (at a higher level of generality) does it demand racial equality or (at the highest level of generality) does it demand equality for all persons? Invoking TOU, Bork tells us that a judge should articulate the principle "at the level of generality that the text and historical evidence warrant." (p. 149) And a page later at "the level of generality that interpretation of the words, structure and history of the Constitution fairly supports" (p. 150) The problem is obvious. The historical evidence suggests a "core idea of black equality." (p. 148) The text, on the other hand, may only be read at the highest level of generality "equal protection of the laws for each and every person." Perhaps I am missing something, but I find TOU utterly unable to answer this question "of crucial importance" when it arises in the context, say, of a gender based claim to equal protection of the laws. There being no TOU sanctioned answer upon which the Court may rely, all that is left are the personal policy preferences of the judges, that is, if Bork is to be believed.

It seems to me that TOU has become but another manipulable balancing test. The whole purpose of Bork's enterprise, in-

deed his reason for being and certainly for writing this book, is to convince us that our only hope for keeping unelected, life tenure judges from infusing their own notions of public policy into constitutional decisions is to tie them to TOU. But short of his discovery of the proverbial smoking gun, the judge most faithfully committed to TOU, even as Bork defines it, is not confined at all.⁵⁵ Put another way, any person who could not in most cases manipulate TOU so as to promote his personal values and political agenda lacks the technical competence to be an Article III judge. He can merely pick the evidence consistent with his own prejudices and write an opinion that will no doubt appear to the public as though he has faithfully followed Judge Bork's prescriptions.

VI. TOU: THE WEAK PARTS - FALSE PREMISES AND THE INEVITABILITY OF JUDICIAL LEGISLATION

There are points where I think Judge Bork is wrong. A major feature of TOU rests on a false premise. Throughout *Tempting*, we find Judge Bork insisting that adherence to TOU is the only stratagem capable of standing between the nation and judges who would write their own values into the Constitution. Bork declares TOU indispensable to the virtues of impartiality, judicial neutrality and adherence to fundamental principles of legal reasoning. We are told that TOU is the only stratagem that will put an end to judicial legislation and will take the Supreme Court out of politics.

Judge Bork's premise is false at two levels. First, it is false because TOU is demonstrably not the only approach to constitutional interpretation that can serve the ends he declares so precious. Ronald Dworkin's Law as Integrity⁵⁶ is a much more complete and comprehensive theory of legal interpretation than Judge Bork has given us. Dworkin has written extensively of the application of his theory to constitutional interpretation. I would not for a moment suggest Dworkin's theory is beyond improvement or even refutation, nor that one could demonstrate

⁵⁵ Hopefully, TOU is but an essay preliminary to a more complete and precise (and pedantic and boring) work to come.

⁵⁶ R. DWORKIN, *supra* note 14, at 176-275.

beyond peradventure that it is the best available theory of constitutional and legal interpretation, although I am presently persuaded of its considerable merits. The point is that Dworkin's theory if faithfully applied by a judge on the Supreme Court is perfectly capable of producing principled, politically neutral, non-result oriented constitutional adjudications of the sort Bork claims he cherishes. Law as Integrity places considerable halts upon judges who might otherwise be inclined to infuse the law with their purely personal policy preferences. Indeed, because Dworkin's theory is worked out with infinitely more care and precision, I regard it far less malleable than TOU. Whatever else one may say of Law's *Empire*, I doubt anyone would ever suggest it was in need of one more good edit.

I have a more fundamental objection. If TOU is so indispensable, how is it that the English get along so well? We tend to forget - perhaps because it does not have judicial review - that England has no written constitution. I am not aware of any suggestions that the House of Lords is incapable of principled, politically neutral, non-result oriented constitutional adjudication. Consider further common law adjudication in England, not to mention in the courts of the several states of this nation. Our history is filled with the names of many great common law judges who practiced the virtue of judicial restraint, decision on principle, and the like, and these wholly without benefit of any written text or any such theory of interpretation as TOU. Whatever else TOU may be, it is certainly not the only road to non-activist, (politically/neutral) principled constitutional adjudication.

This point is important and worth a pause. Judges do and must legislate. What is the common law other than a lot of judge-made law?⁵⁷ What is the Constitution but a series of majestic generalities into which judges have no choice but to read - somebody's - personal value system and notions of public policy?

⁵⁷ Eight years earlier John Chipman Gray had argued forcefully, if fallaciously, that judges did all of the law making, legislating, if you will. J. GRAY, *The Natural and Sources of Law* 248-59 (1909). Indeed, statutes were regarded by Gray as mere sources of law, not law itself absent the imprimatur of judicial interpretation and application.

Every decision, at least every decision by the highest appellate court of the particular jurisdiction, has a component that is generically legislative. Every time the Supreme Court grants certiorari, it is for the purpose of legislating. A rule or principle,⁵⁸ usually several of each, may be found patent or latent within every appellate decision. Those rules and principles operate within the society as legislation. They affect society as legislation affects society. They are inevitably grounded at least in part upon legislative facts and perceived public policy. To put the point boldly, when they decide cases, courts (particularly appellate courts) legislate whether they intend to do so, whether they understand they are doing so, when they disclaim that they are doing so, and even when they consciously intend to refrain from doing so.⁵⁹

That great practitioner of judicial restraint, Oliver Wendell Holmes, Jr., taught us elaborately in his pre-judicial career. In 1881 in *The Common Law* he wrote "In substance the growth of the law is legislative."⁶⁰ He denied that judges find law in some place beyond their fertile though hopefully trained and disciplined perceptions of "what is expedient for the community concerned."⁶¹ Instead Holmes, almost a century ago, saw that judicial decisions present *new* law. He matter-of-factly gave the lie to the contrary notion, "What the courts declare to have always been the law is in fact new. It is legislative in its grounds."⁶²

⁵⁸ Much has been written, both brilliant and varied, about the differences between rules and principles and the nature and course of each. See R. DWORKIN, *supra* note 14, at 22-31 (attacking Hart's Positivism by distinguishing rules of law from principles); HART & SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 155 (Tent. ed. 1958) (differences in rules and principles); Schlag, *Rules and Standards*, 33 U.C.L.A. L. REV. 379, 386 (1985) (rules versus standards discussion). In the context in which I speak, I find a like legislative effect in the case of rules and their more open textured variants, principles and standards, regardless of their nature or source or of the type social order they may facilitate.

⁵⁹ A familiar and typical example of judges legislating while trying not to is *Halcyon Lines, Inc. v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952). *Halcyon Lines* has been immortalized in Hart & Sacks, *supra* note 58, at 515-41.

⁶⁰ O. HOLMES, *supra* note 12, at 35.

⁶¹ *Id.*; see also *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers*, Shriver ed. 10 (1973), Holmes, *Common Carriers and the Common Law*, 13 Am. Law Rev. 630, 631 (1879).

⁶² *Id.* Compare *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919

Holmes, insistence that we study the history of our law was to the end of "a more conscious recognition of the legislative function of the courts."⁶³

Still the idea strikes us as counter-intuitive. The world trembles, then as now, at the thought that judges legislate, and it is these fears that Judge Bork exploits. Yet, in Holmes' day, as now, notions of public policy and community convenience generated judicial legislation. Those same notions Holmes declared nothing less than "[T]he secret root from which the law draws all the juices of life."⁶⁴ More timorous judicial souls keep secret the root, where they have perceived it all. The bold and perceptive few have mentioned it "[R]arely. . . , and always with an apology."⁶⁵ Thirty-six years later Holmes wrote,⁶⁶ "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."⁶⁷ Even Judge Bork concedes this much (see pp. 5, 167). Dworkin calls this legislation in the "trivial sense."⁶⁸ But trivial and interstitial textual tinkering over time, even when practiced with great integrity, yield ultimately a vast product. Like the poor, judicial legislation is always with us, and at its best it is glacial both in our perception and in its power.

The point may be summed up in an anecdote: the life of Holmes. He was the first to open our eyes to the historical reality and present necessity (inevitability) of judicial discretion and its progeny, judicial legislation. Yet in his fifty years as an appellate judge, first in Boston and then in Washington, no judge practiced principled, politically neutral, non-result oriented judicial lawmaking with greater fidelity. The life and teachings of Oliver Wendell Holmes, Jr., gives the lie to TOU's *raison d'être*.

(1983) (legislative history shows desire to limit federal powers affecting states) with H.L.A. HART, *supra* note 5, at 43 (legislatures confined and controlled by rules).

⁶³ O. HOLMES, *supra* note 12, at 36.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ What Holmes said in *The Common Law* in 1881 should be seen as the perceptions of an external observer. What he later wrote in *Jensen* and other cases should be taken as the thoughts of an internal official participant in the system.

⁶⁷ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting opinion).

⁶⁸ R. DWORKIN, *supra* note 14, at 6.

VII. "A FOOLISH CONSISTENCY IS. . ."

A. *Judicial Review*

One of *Tempting's* most troubling features is that Bork himself succumbs to temptation, and often. The best articulation of TOU is that search for the objective meaning of the constitutional text upon which the ratifiers conferred legal validity. I think Bork would agree. As judges must be cabined, one would expect a rigorous, unbending enforcement of TOU in specific cases and across the board. From one with a distinguished academic background, we are entitled to expect consistent, principled application of TOU, particularly when the chips are down. Of course, Judge Bork does not disappoint when he confronts the political agenda of the American Right - abortion, affirmative action, etc. But when he comes face-to-face with the constitutional questions that truly are fundamental, Judge Bork yields to temptation and puts TOU on the shelf.

No better example may be found than the doctrine of judicial review itself. Judge Bork makes clear that without judicial review, there is no (serious) reason for concern. Yet he acknowledges, as he must, that "many historians are not even sure the founders as a group contemplated any form of judicial review" (p. 209). We know the doctrine appears nowhere in the explicit text. It must be implied if we are to have it, but as we say this we must confront Dworkin's reminder that judicial review hardly follow[s] as a matter of iron logic.⁶⁹ The text upon which judicial review hinges is, of course, the Supremacy Clause which states "the Constitution. . . shall be the supreme law of the land." To be sure, Alexander Hamilton argued that this meant judicial review.⁷⁰ John Marshall certainly thought that it did in 1803.⁷¹ But if we interpret the Supremacy Clause in faithful accord with the methodology of TOU the conclusion is inescapable that there is no single ascertainable "original understanding."

⁶⁹ R. DWORKIN, *supra* note 14, at 355.

⁷⁰ *The Federalist* No. 78. But see ELY, *supra* note 13, at 5 (The Federalist was initially meant as propaganda).

⁷¹ The Supreme Court of Mississippi has found the power of judicial review implicit in each of the state's constitutions. *Alexander v. State by and Through Allain*, 441 So. 2d 1329, 1333 (Miss. 1983); *Runnels v. State*, 1 Miss. (Walker) 146 (1823).

The two choices are: the Supreme Court does have the authority to review under the Constitution enactments of the Congress and of the legislatures of the state or it does not. In 1787 different people understood it different ways and, most likely, most never thought about it. But accepting that we must seek an objective reading of the text, the case seems moderately convincing that the Supreme Court does have the power of judicial review. The phrase "judicial power" within article III sensibly includes the power to interpret and authority to enforce the majestic mandate of the Supremacy clause that "This Constitution . . . shall be the supreme law of the land."⁷² When we complicate that objective reading, however, by resort to TOU's strictures, the answer becomes doubtful.⁷³ If we subject judicial review to the same level of scrutiny Bork brings to bear in banishing the right of privacy, we have no alternative but to give up the doctrine. There is no more TOU evidence suggesting the power of judicial review than may be found suggesting a constitutional right of privacy. By Judge Bork's own standards, Chief Justice Marshall in *Marbury v. Madison*⁷⁴ was just as "out of control" as were, in Bork's view, *Dred Scott*, *Lochner* and *Roe v. Wade*.

Yet one may search *Tempting* in vain for language suggesting that Bork thinks we should give up judicial review. Rather clearly he accepts it, and I find no hint that he does so out of any sense that laches bars the Court's overruling *Marbury*. He tells us "the good news about *Marbury*" is a question begging "[it is grounded] upon the fact that the United States has a written constitution."⁷⁵ (p. 24). At one point he considers the possibility that "we must abandon . . . judicial review" (p. 163), but on grounds TOU is not working otherwise. It appears not to have occurred to him that judicial review itself must pass

⁷² See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-10 (1959) (constitution is basis of judicial review).

⁷³ Leonard W. Levy considers the point with great care in his *Original Intent and the Framers Constitution*, and concludes "Judicial Review in fact exists by the tacit consent of the governed. Original intent had almost nothing to do with it." L. LEVY, *ORIGINAL INTENT AND THE FRAMERS CONSTITUTION* at 123 (1988).

⁷⁴ 5 U.S. 137 (1803).

⁷⁵ Bork's close friend and colleague, the late Alexander Bickel, taught long ago that judicial review may not be derived from the mere fact that we have a written constitution. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 3 (1962).

TOU inspection. Indeed, early on in the book we are treated to a surprising expression, "Moreover, we retain the institution of judicial review because we have found that *it does much good*" (p. 11). Similar expressions that the law may be but a means and not an end are sprinkled throughout the book. Yet few pages fail to find Bork bashing those who would read the Constitution so as to "do. . .much good" (see pp. 16, 81). A chapter subtitle posits "Good Results vs. Legitimate Process" (p. 261) and ends with a powerful condemnation of "the man who prefers results to processes. . . ." (p. 265). For the most part Bork is the stern proponent of doctrine who would hang his own grandmother if the law required it. Perhaps I am missing something but Bork follows this hint that he just may indeed be a closet pragmatic instrumentalist (to use the good eight bit phrase) with the statement that the institution of judicial review "make[s] the misuse of judicial power all the more insidious" (p. 11). Indeed, judicial review is the reason we have "the problem," the reason he wrote the book. It is also a reason that may not survive TOU scrutiny. I cannot resist noting a doctrine familiar in contract law, "If a party has the power to avoid damage, that party has no legal right to experience that damage and send the bill to the breaching party."⁷⁶

If I understand correctly the structure of Bork's book, the evils of which he complains could be avoided if we jettisoned judicial review. If one accepts TOU, and takes it seriously, we cannot have judicial review. I personally think judicial review is a doctrine of constitutional dimensions that is defensible within correct principles of legal reasoning as well as American constitutional history. I think it represents a correct reading of the CLV sanctioned constitutional text, but I do not think - and Bork's book makes clear to me that he does not think - that judicial review can withstand scrutiny under TOU. I am left unclear how Bork justifies his refusal to apply TOU to judicial review but instead accepts it on pragmatic policy grounds. "It would be wrong for those of use who have never faced the possible failure of the entire enterprise that is the United States to be

⁷⁶ UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 757 (Miss. 1987).

too easily critical of Marshall's performance (p. 28).

B. *"Incorporation" of the Bill of Rights*

Bork treats our second most fundamental constitutional question - "incorporation" of the Bill of Rights - quite differently. He describes the rise of incorporation theory (pp. 93-95), opines that it has "enormously expanded the Court's power over the states" (p. 129), and "has done much to alter the moral tone of communities across the country" (p. 95). He declares, "the controversy . . . continues to this day" (p. 94). *Tempting's* bottom line, however, is that "There is no occasion here to attempt to resolve the controversy concerning the application of the Bill of Rights to the states" (p. 93), for "as a matter of judicial practice, the issue is settled" (p. 94). He simply says we have no occasion to reconsider the question, period. I doubt there are many informed persons unaware that "incorporation" theory would never pass muster under TOU.⁷⁷ Yet if we rid ourselves of "incorporation," the great bulk of "the problem" would disappear. For the occasions when the Supreme Court has held an act of Congress unconstitutional have been few and far between - at least over the last half century.

C. *TOU - But Another Fighting Faith*⁷⁸

There is a further problem with TOU. Recall Bork's (false) dichotomy: a judge making a constitutional decision either

⁷⁷ See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 134-56 (1977) (explaining problems with incorporation theory); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 146, 147-83 (1965) (collecting cases rejecting claims that specific provisions of first eight amendments to Constitution apply to states through incorporation); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 24 (1949) (examining history of fourteenth amendment through hearings).

⁷⁸ I refer to Holmes' powerful and poetic point that

When men have realized that time has upset many *fighting faiths*, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

grounds his decision in TOU of some explicit text of the Constitution or he expounds pure personal preferences, prejudices and is "out of control." Of course the text of the Constitution is valid law, our supreme law. Its existence comports with CLV. But whence Judge Bork's interpretative theory which he labels "The Original Understanding"? What language in the text of the Constitution directs TOU as "the" methodology for interpreting the Constitution? What actions of the ratifiers mandate TOU? What original understanding? The point is critical, for unless Judge Bork can point to something in the Constitution that is rather explicit and that declares TOU the holy grail of constitutional interpretation, his enterprise falls like a house of cards.

As an appendix to his book Judge Bork attaches a copy of the Constitution, suggesting that some of us need to read it. I have read it and I have re-read it and, accepting the possibility that I have overlooked something or may be mistaken, I do not find any language which even begins to suggest interpretation must accord with Judge Bork's (or anybody else's) theory of the Original Understanding. If I am correct in this, and if we take Judge Bork at his word, that is, that anything done in the name of the Constitution which cannot be tied to TOU of a specific provision of the text is by definition a pure uncontrolled personal preference, . . . well, you can take it from there.

In point of fact we have much competent scholarship that Bork commits historical error when he argues that the original understanding of the ratifiers was that the Constitution be interpreted according to TOU.⁷⁹ Judge Bork offers but a superficial rebuttal (pp. 153-55), ending with the tepid claim that TOU is but "a necessary inference from the structure of government apparent on the face of the Constitution" (p. 155). Let me be quick to point out that I regard such inferences legitimate sources of legal interpretation. They are not allowed under TOU as Bork has given it to us.

I might add that my present point does not refute or discredit TOU. It merely makes more modest the claims Judge

⁷⁹ See, e.g., LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 1-29 (1988) (arguing Constitution's meaning changes when public endorses course of judicial or political practice).

Bork may make in its name. TOU is seen no different from any other theory of constitutional interpretation, that is, the idea of a caring and thoughtful scholar that must compete ultimately in the marketplace of public opinion.⁸⁰

D. Bork the Revisionist

Consider another feature of "The Original Understanding." Judge Bork declares "[t]he Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest" (p. 147). He gives examples. The first amendment begins "Congress shall make no law . . .," and then assures us that surely the first amendment does not mean that. I am inclined to agree, but because other rights and constitutional powers inevitably clash with any such right,⁸¹ not because I do not take seriously the wording of the amendment. He tells us elsewhere that the fourteenth amendment declares that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . ." and then insists repeatedly that we are not to take the language seriously. Surely the draftsmen did not mean "any person" (pp. 66-67).

It is a serious question just how we "know" these things. What text in the Constitution tells us that we should not take its words according to their common and ordinary meaning? How does TOU yield this view? Bork assures us that no one has ever supposed that the first amendment was absolute, with the possible exception of Justices Black⁸² and Douglas, but he offers us nothing fitting his criteria of TOU which supports *his* constitutional revisionism. Certainly the history of the fourteenth amendment reflects concern for the newly-freed slaves, but Bork gives us little suggesting that in 1868 the public would have understood the phrase "any person" in the equal protection clause to mean only "any black person." Here again Bork has offered

⁸⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁸¹ See, e.g., *Mississippi Publishers Corp. v. Coleman*, 515 So. 2d 1163, 1165 (Miss. 1987) (right to fair trial not always harmonious with right to free press).

⁸² Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); *Smith v. California*, 361 U.S. 147, 157-59 (Black, J., concurring) (cite is to one of several cases where Black articulated his "absolute" theory of first amendment).

us a component of his theory of interpretation not grounded in the text of the Constitution, which leads to the more fundamental question.

What is it that authorizes that we read the Constitution so restrictively so that we ignore the plain meaning of its words? What empowers us to give the simple language substantially less scope that its words import? What gives us the prerogative to give a constitutional text an interpretation, when applied to specific cases, that does not fit the text and the best statement of principles embedded in it? On the subject of the equal protection clause, I find perfectly sensible the reasonably contemporaneous comment of Justice Bradley who stated, "[t]hey [black persons] may have been the primary cause of the amendment but its language is general, embracing all citizens, and I think it was purposely so expressed."⁸³ Judge Bork does not, at least not in the first part of this book.

Bork's reading of the Equal Protection Clause to protect only "any black person" does not pass muster under CLV. No text containing the limiting phrase "any black person" was endorsed by the necessary two-thirds majority of the Senate and House of Representatives. No such text was submitted to or ratified by three-fourths of the states. If, as I insist, courts may enforce only those laws which satisfy CLV, judges have no authority to read "any person" in the equal protection clause to mean only "any black person." To the contrary, such a reading is constitutional revisionism of a rather rank sort. It simply does not fit the text the constitutional ratifiers have given us.

E. Three Specifics

1. Reapportionment

Consider now a few specific cases. Judge Bork is extremely critical of the Warren Court's reapportionment decisions. To him the one man one vote idea was purely the fabric of the imagination of Chief Justice Warren and the others who voted for those decisions. He refuses to take seriously the idea that the one man one vote principle is impelled by a thoughtful contem-

⁸³ 83 U.S. (16 Wall.) 36, 123 (1872) (Bradley, J., dissenting).

plation of the wording of the equal protection clause. He points to a personal experience and tells us of the practical problems reapportionment cases have generated. I am not totally out of sympathy with his views. However, it seems rather silly to deny that my guarantee of equal protection of the laws is not violated if in a malapportioned legislative body vote carries one-fourth the weight of yours. I remember *Reynolds v. Sims*⁸⁴ as it was working its way through the courts and thinking, notwithstanding the mandate that a state house of representatives be fairly apportioned, the state senate was a different matter. Like others, I could not shake from mind the shape of the United States Senate.

But given TOU, what Judge Bork has to say about the subject and particularly about *Baker v. Carr*⁸⁵ is little short of amazing. First he points out that, as an interpretation and application of the equal protection clause, *Baker* flunks under TOU scrutiny. Maybe so, although I am not persuaded. He then surprises us declaring "[t]here is no doubt in my mind . . . that plaintiffs deserved to win" (p. 85). Judge Bork goes on to cite the guaranty clause, article IV, section 4, which reads, in relevant part, "[t]he United States shall guarantee to every state in this union a republican form of government." The guaranty clause, not the equal protection clause, undergirded plaintiffs' entitlement to relief. I do not doubt the idea but, coming from Judge Bork, it strikes me quite odd, particularly as he wholly fails to articulate how application of TOU of the guaranty clause yields relief for the plaintiffs in *Baker v. Carr*. Certainly the text is sufficiently vague and general that no good "Borkian" could find this meaning in the clause. The objective meaning of the text as understood in 1787 is not mentioned. No note is taken of "secondary materials, such as debates at the convention, public discussion, newspaper articles, dictionaries in use at the time, and the like" (p. 144). Bork makes a reference to Madison's writings (p. 87) but cites nothing other than a passage that state governments should not become "aristocratic or monarchical," which of course proves nothing. Besides this, as Bork has him-

⁸⁴ 377 U.S. 533 (1964).

⁸⁵ 369 U.S. 186 (1962).

self acknowledged, the Supreme Court long ago held that it may not enforce the clause under any circumstances.⁸⁶

One who accepts TOU may not escape that predicating *Baker v. Carr* on the guaranty clause is equally as problematical as grounding it in the equal protection clause. But then, having bashed *Reynolds v. Sims*, Bork, still talking about the guaranty clause, cites with approval Justice Stewart to the effect that apportionment "[m]ust be such as not to permit the systematic frustration of the will of a majority of the electorate of the state" (p. 87). One does not have to be too smart to realize that this criteria would justify *Reynolds*, for a malapportioned Senate is perfectly capable of systematically and continuously frustrating the will of a majority of the electorate of the state.

There may be problems constitutionally, remedially and practically with the Supreme Court's reapportionment cases but Judge Bork has hardly shown us a better way. His position suffers the same vices he attributes to the Warren Court, concluding with a completely self-contradictory position. Although he has for the most part declared the point off-limits, at least as an original proposition, I dare say that because of the reapportionment decisions, government in the several states serves the people a bit better than before.

2. Public School Desegregation

Turn now to *Brown v. Board of Education*.⁸⁷ Bork repeats the criticisms others over the years have directed to the craftsmanship of the opinion (p. 78),⁸⁸ but in the end, accepts that the case was decided correctly. His problem, again, is that faithful application of TOU mandates precisely the opposite result. Bork admits the uncomfortable fact that in 1868, "[n]o one then imagined the equal protection clause might affect school segregation" (pp. 76-75).⁸⁹ He thinks he extricates himself from his

⁸⁶ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

⁸⁷ 347 U.S. 483 (1954).

⁸⁸ See Wechsler, *supra* note 72, at 31-35 (problem in opinion inherent in reasoning).

⁸⁹ See R. DWORKIN, *supra* note 13, at 388 (decision for plaintiffs that state impose racial segregation in education is unconstitutional); see also R. BERGER, *GOVERNMENT BY JUDICIARY* 177-83 (1977) (framers had no intention of striking down segregation); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 6-24

dilemma by insisting that there are two aspects of The Original Understanding of the Equal Protection Clause. First, the establishment of "equality under law" and second, that school segregation would not be disturbed. Because equality was mentioned in the amendment and segregation was not, the Court appropriately opted for equality. The amendment's general prescription of equality under the law trumps the original understanding that it did not enjoin racially segregated schools!

With respect, the effort is disingenuous. Judge Bork has given the equal protection clause a reading 180 degrees at odds with "what the public of that time would have understood the words to mean" (p. 144). He is telling us that he practices TOU only when to do so suits his own personal value system or political prejudices. More fundamentally, Bork's "equality under law" was exactly the way the South's massive resisters read *Brown*. Bork's reason for condemning "separate but equal" is that it "rarely if ever produced equality" (p. 82). But this admits that, if the South could have shown the converse, *Brown* could have had to fall. Indeed, in the late 1950's, many southern communities embarked on massive programs of improvement of public facilities for black persons toward precisely that end. *Brown* may not survive neutral scrutiny under TOU but was and is correct, purely and simply, because the noble notion of equality under the law articulated in the CLV-approved constitutional text has reached that level of imperfect maturity where the law of relevant resemblances embedded in it no longer allows that we classify people according to the color of their skin.

3. Sex Discrimination

Bork's position on constitutional scrutiny of gender discrimination is enigmatic. He has told us that the TOU of "any person" within the equal protection clause is "any black person" (pp. 37-39, 180). Conversely, there are certainly no materials satisfying TOU which would reflect any contemporaneous "understanding" that women were being given any constitutional level equality protections. One would think, therefore, Bork would

(1955) (background materials are absent proof of supporting evidence for decision).

have to condemn such decisions as *Reed v. Reed*.⁹⁰ Curiously, he says no such thing. Initially, Bork acknowledges "some distinctions [on the basis of sexual differences] . . . have no apparent basis" (p. 150). Later he discovers that the actual language of the equal protection clause makes its coverage simply available to "any person" (p. 329). He then offers the amazing statement that "[t]he question becomes how far the protection of the clause may be extended beyond race and ethnicity" (p. 330). That question is a serious one arising from the language of the equal protection clause (p. 330). But, it does not arise under the TOU of the equal protection clause. All of this is followed by the most unusual sentence of all where Bork writes, "[t]here is unlikely to be much work for the Equal Protection Clause with respect to governmental distinctions between the sexes because legislators are hardly likely to impose invidious discriminations upon a group that comprises a slight majority of the electorate" (p. 330). Contrary to this statement, legislatures have imposed gender discrimination within modern memory. Consider a concrete example familiar to many in the State of Mississippi. Prior to 1968, state law limited jury service to otherwise eligible men.⁹¹ The Supreme Court of Mississippi rejected an equal protection attack on the statute as recently as 1966.⁹² In point of historical fact, unelected, life tenure federal judges did the noble dirty work and held discrimination against women in jury service could not withstand scrutiny under the equal protection clause.⁹³ And it was under the pressure of these decisions, and not the "group that comprises a slight majority of the electorate," that the legislature amended the statute in 1968. The question that Judge Bork needs to answer, however, is how, and by what rationale, he would have voted had he been a member of the

⁹⁰ 404 U.S. 71 (1971). In *Reed*, the Court held that a statutory preference for males over females for the office of administrator of an estate offended rights secured to women under the equal protection clause. *Reed*, 404 U.S. at 80-81.

⁹¹ Miss. CODE ANN. § 1762 (1942). In addition to this example, consider *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), wherein the Court held that MUW's policy of excluding males from enrolling in its professional nursing school offended equal protection.

⁹² *State v. Hall*, 187 So. 2d 861, 870 (Miss. 1966).

⁹³ See *White v. Crook*, 261 F. Supp. 401, 408-09 (M.D. Ala. 1966); *Pendergraft v. Cook*, 466 F.2d 1222 (5th Cir. 1971).

three-judge federal district court in *White v. Crook* or perhaps a member of the Supreme Court of Mississippi in *State v. Hall* as they considered these challenges. Assuming no problems of standing and justiciability in a given case, it seems to me incredible in 1966, much less in 1990, that a competent jurist would interpret the phrase "any person" within the equal protection clause so as to countenance blatant state-imposed discrimination against women in jury service. Based on my reading of his book, my hunch is that Bork would find a way to strike the statute. The point, of course, is that if he does so, he delivers another serious blow to his TOU edifice, not to mention his own intellectual integrity.⁹⁴

VIII. THE PRIVILEGES AND IMMUNITIES CLAUSE: A CASE STUDY IN THE FAILURE OF TOU

The criteria for Legal Validity and the interpretive imperative sharply in mind, we need to take a look at the privileges and immunities clause of the fourteenth amendment. The clause declares that, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁹⁵ Suppose a citizen brings a suit asserting that a state has abridged a privilege or immunity secured to him as a citizen of the United States and that the case presents a factual context the court has never addressed. Judge Bork says that TOU does not allow us to "make out the meaning" of the clause and further writes, "There being nothing to work with, the judge should refrain from working."⁹⁶ (p. 166.). Because of the absence of ma-

⁹⁴ It may be that I am unfair on this point. The judge who finds fault with *Bolling v. Sharpe*, 347 U.S. 497 (1954), and would hold that public school segregation within the District of Columbia withstands constitutional scrutiny because the equal protection clause does not restrict the power of the federal government, is certainly capable of holding that the equal protection clause similarly does not prohibit state-imposed discrimination against women. Additionally, if there were no thirteenth amendment and it there were no equal protection clause in the fourteenth amendment, how would TOU handle the constitutionality of slavery?

⁹⁵ U.S. CONST. amend. XIV, § 1. The original Constitution declared, "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. art. IV, § 2, cl. 1. See *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (E.D. Pa. 1823) (giving clause expansive reading).

⁹⁶ At various points, Bork makes clear that TOU applies to the reading of statutes

terial satisfying TOU, Bork is seriously telling us that a CLV-approved provision of the fourteenth amendment, which may certainly be presumed a purposive act since the words did not write themselves into the amendment, *should have no meaning!* Yet it defies common sense to suggest that TOU of the privileges and immunities clause as ratified in 1868 was that it would have no meaning or effect.⁹⁷

There is a fundamental point here. If there is a case before him, within his jurisdictional competence, the judge has no choice but to work. And as he works, he has no choice but to interpret. His decision will effect an interpretation whether he intends one or not. His options concern only the content of the interpretation he renders and the quality of the process he employs en route. A chief executive can always do nothing. A legislature may adjourn, or refer a bill back to committee. Courts may delay but in the end, we must decide. And as we decide, we interpret; hence, the interpretative imperative.

Consider the case of Justice Quixot, a Justice of the Supreme Court⁹⁸ who has read *Tempting* and millennia ahead, still accepts TOU and is determined not to legislate his values and notions of public policy into the Constitution. He has taken an oath to uphold the Constitution. The Constitution vests all legis-

as well as the Constitution (and I certainly agree that theories of legal interpretation that vary with the classification and genre of law being interpreted are flawed). I would think it instructive for Judge Bork to reflect upon the dilemma TOU would present to judges in the State of Mississippi. For better or for worse, there are available in this state most meager resources for ascertaining TOU of the Mississippi Constitution of 1890. And for years, our legislature has enacted statutes without providing any formal published legislative history. It is fair to say that for the most part judges and lawyers in this state are left with but a single reliable source - the text itself. If it can work at all as a theory of legal interpretation, TOU must be undergirded by a massive paper trail detailing "the meaning understood at the time of the law's enactment . . . what the public of that time have understood the words to mean." (p. 144).

⁹⁷ For a fuller discussion that I find attractive, see ELY, *DEMOCRACY AND DISTRUST* 22-30 (1980), and I do not share Bork's horror at Ely's reading of the clause as "a delegation to future constitutional decision-makers." R. Bork, *supra* note 3, at 180. The rest of the Constitution is in fact such a delegation, and I see no reason for excluding the privileges and immunities clause.

⁹⁸ The Supreme Court may deny certiorari and duck the issue I am about to pose, but some court presumably ultimately a U.S. Court of Appeals, must decide it. For present purpose, I think it fair to posit the assumption that the case is before the Supreme Court.

lative power in the Senate and the House of Representatives and none in his Court.⁹⁹ Justice Quixot's oath as well is to "administer justice."

On the evening of April 1, 4990, Arnold Aardvark is whambling¹⁰⁰ within the privacy of his home. It is a slow night and Sheldon Schmuck, a citizen, and his friend, Officer Calvin Krumpke of the River City Vice Squad, are lounging around the police station, bored to tears. They decide to turn on the city's new radio wave telephotography equipment and begin scanning the city until they happen to beam in on the Aardvark residence where Arnold is whambling in a slow and deliberate fashion. "Wow?" Schmuck explains. "I'll bet the people of River City would love this. Let's plug this guy in," whereupon Krumpke flips the switch, preempting all television programming, and instead beaming Arnold's whambling into every home in the city. Arnold, who has always enjoyed watching television while whambling, suddenly sees himself on the screen and realizes what has happened. In due course, Arnold brings an action in U.S. District Court against Schmuck and Krumpke under 42 U.S.C. § 1983 charging that under color of state law, Schmuck and Krumpke have invaded his privacy and have thus abridged the rights, privileges and immunities secured to him by the Constitution of the United States.

It seems that the practice of whambling first arose near the end of the Twenty-ninth century. At the time, many feared it might generate organisms which if spread might produce a serious health hazard and many states passed laws condemning whambling. By the end of the Thirtieth century, medical and biological research had shown conclusively that there was no health hazard associated with whambling and the statutes have fallen into disuse. In fact, numerous behavioral studies have established that whambling is widely practiced by the people of River City, though predominantly in private.¹⁰¹

⁹⁹ See U.S. CONST. art. III, § 1 (only judicial power is vested in Supreme Court).

¹⁰⁰ I borrow from the late Lon Fuller's *Case of the Interrupted Whambler* in L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 628 (Temp. ed. 1949), which seems never to lose its capacity to teach.

¹⁰¹ See Whitten & Robertson, *Post-Custody, Pre-Indictment Problems of Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247,

Justice Quixot has before him the case of *Aardvark v. Schmuck and Krumpke*, and he is assigned to write the opinion for the court. Justice Quixot takes his oath seriously. He takes TOU equally seriously. But while in law school, he heard of Holmes' heresy that judges legislate¹⁰² and he is aware of much commentary to like effect. Justice Quixot will take no chances. He realizes that a negative interpretation of the privileges and immunities clause is as much an interpretation as any other. Rather than write a traditional judicial opinion deciding the case, he will merely state the facts, the claims and defenses, and the judgment below, followed by a one liner, affirmed or reversed, as the case may be.¹⁰³ This would be a rather unusual opinion. Justice Quixot will have consciously decided that he will disregard what is normally expected in judicial opinion writing for the greater good of assuring that nothing he does, nothing he says, will result in legislation or even have a legislative effect. He is obsessed that he must not infuse non-TOU validated values into the Constitution and he accepts that in the case of the privileges and immunities, there are no such values.

But Justice Quixot makes one mistake. He allows the opinion to be published. In due course, lawyers around the country pick up copies of the opinion. Sooner or later some lawyer will perceive that he has a case that is similar on its facts. He will argue that on its facts, *Aardvark v. Schmuck and Krumpke* is like his case and therefore, the decision in his case should be consistent in principle with *Aardvark*. Other lawyers will read *Aardvark* and conclude that, for *Aardvark* to have been decided for the plaintiff, or for the defendant, as the case may have been, there must have been rule(s) or principle(s) which, when applied to the facts, yielded the result announced by the Court. The privileges and immunities clause must have had a meaning that led to relief for *Aardvark* or denial thereof. Knowing the facts and the result, the lawyer employs quasi-algebraic techniques to divine the rule of law, the rule of law, I might add, that Justice

250-70 (1988) (chronicle of *Aardvark* case).

¹⁰² O. HOLMES, *supra* note 12, at 35.

¹⁰³ Or, in Judge Bork's view, whichever would be necessary to enter final judgment for the defendant, for the plaintiff has no enforceable rights under the privileges and immunities clause because the clause confers no rights upon anyone.

Quixot in *Aardvark* consciously did not state, for he did not want to legislate. A third lawyer will pick up *Aardvark* and decide that the case he has is substantially distinguishable, but he will have to identify the distinguishing characteristics and explain why the interpretation of the privileges and immunities clause imbedded in *Aardvark v. Schmuck* does not require a like result in his case. It is a well-known irony that the bench and bar of necessity must attribute to a given decision a greater rationality and fidelity to law than often in fact underlie it.

Judge Bork has told us that the "intended meaning [of the privileges and immunities clause] remains largely unknown" (p. 37), that we do not know what the clause was intended to mean," (p. 180), and has commanded that we give it no meaning. Yet *Aardvark* confounds Bork by the mere act of bringing an action and navigating its procedural courses to a decision on the merits. *Aardvark* may not win. But he can make Bork work.

Justice Quixot's efforts to take the Court out of the business of legislating its value judgments into the Constitution will founder upon the rock-bound coast of reality. One rock is called *stare decisis*. It is the principle pervasive in the legal system that, once a matter is authoritatively settled through the judicial institutions of the system, that settlement ought to be respected unless and until authoritatively changed.¹⁰⁴ The idea is sometimes known simply as the rule of precedent (pp. 62, 67). TOU may well compel *stare decisis*, for Bork himself tells us "At the time of the ratification, judicial power was known to be to some degree confined by an obligation to respect precedent" (p. 157). The rule is traceable back before the Constitution, back to the elementary notion that justice requires that like cases be decided alike,¹⁰⁵ absent powerful countervailing considerations.

There is a second rock upon which Justice Quixot's efforts founder. That is the rock of reason, the rock which holds that the decision of cases ought to be the product of non-result oriented neutral principles of legal reasoning. I understand Judge

¹⁰⁴ See Hart & Sack, *supra* note 58, at 4-6 (principle of institutional settlement).

¹⁰⁵ See *Griffith v. Kentucky*, 479 U.S. 314, 323-34 (elaboration on consistent adjudication of similar cases); R. DWORKIN, *supra* note 14, at 133 (political history provides reason for ruling on later cases in similar ways); see also, Whitten & Robertson, *supra* note 101, at 298-99 (Mississippi rule of *stare decisis* solidly imbedded).

Bork to accept this view. This process at a very minimum envisions three separate, distinct stages: ascertaining the facts, stating or declaring the rule or rules of law, and applying the law to the facts to produce a result, that is, a judgment for the plaintiff or judgment for the defendant.¹⁰⁶ It envisions further that there is a process of reasoned elaboration¹⁰⁷ employed in defining and articulating the controlling rules of principles which, when applied, produce an adjudication. All of this is a part of the process that trained lawyers will employ to reconstruct *Aardvark v. Schmuck and Krumpke*, its holding and rationale whether the court consciously or competently employed it or not.

The principles of reason and precedent are not to be confused with such scientific principles as Einstein's gravity or even Boltzmann's thermodynamics although attractive physical analogues may be found in quantum mechanics¹⁰⁸ and chaos.¹⁰⁹ To the contrary, these principles reflect widely shared value judgments that the legal system will better serve society if it is founded upon justice qua reason and stare decisis. That it will be ever thus is not a function of scientific postulate but of thought of the alternative. A social order in which no respect is given precedent and in which irrationality in the decision-making process are acceptable will soon be one without a legal system, as the late Lon Fuller has perceptively illustrated.¹¹⁰

The point in the end is the inexorable reality that *Aardvark v. Schmuck and Krumpke* will interpret the privileges and immunities clause and will necessarily carry with it some value judgment that lawyers will infer no matter how the opinion is worded. The opinion will naturally make, amend, and refine the

¹⁰⁶ See *Boardman v. United Serv. Auto. Ass'n*, 470 So. 2d 1024, 1029-30 (Miss. 1985) (citing HART & SACKS, *The Legal Process: Basic Problems in the Making and Application of Law*, 374-75 (Ten. Ed. 1958) (recognizing three stages of legal reasoning).

¹⁰⁷ See HART & SACKS, *supra* note 58, at 160-79 (centerpiece is idea of process of reasoned elaboration).

¹⁰⁸ *The Second Creation* at 52-71 (1986); WOLF, *TAKING THE QUANTUM LEAP* (1981). Quantum theory instructs us of the impossibility of determining at once the exact location of a particle and exactly where it is going. Substitute "law" for "particle" and the idea becomes quite telling. Whitten & Robertson, *supra* note 101, at 274.

¹⁰⁹ GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987); CRUTCHFIELD, ET AL, *CHAOS* 255 *Scientific American* 46-57 (Dec. 1986).

¹¹⁰ FULLER, *THE MORALITY OF LAW*, at 34, 46-49 (1964).

law.¹¹¹ A negative interpretation affords no escape. A negative interpretation, leading to judgment for Schmuck and Krumpke, implies a judicial finding that the values Aardvark invokes are not embodied in the privileges and immunities clause. Such a finding is indisputably a value laden interpretation of the clause. Thus, a decision for defendants may only say the clause affords Aardvark no right to relief on the present facts, not that it will never afford him relief on any facts. Notwithstanding that TOU enjoins interpretation, the Constitution mandates it because it creates a system in which courts and the judges commissioned to serve them must decide. This interpretive imperative is at the very least "a necessary inference from the structure of government on the face of the Constitution" (p. 155).

IX. TOWARD A BETTER WAY

Of course, not just any interpretation of the privileges and immunities clause is acceptable. Not just any decision in *Aardvark v. Schmuck and Krumpke* will do, nor will any interpretative methodology, for it *does* matter how judges decide cases. What does textually grounded, principled, politically neutral, non-result oriented legal reasoning require?

I begin as does Bork with the CLV-approved text; that is, with the language that has been ratified and thus formally made a part of the Constitution. Like Judge Bork, I am an unrepentant legal positivist, although I would state the point a bit more sharply than he. Only that, and all of that, which has satisfied legal validity forms a part of the constitutional text so that it confers legal powers and rights and can thus be legitimate objects of interpretation, and when a citizen brings a suit, it becomes a necessary object of interpretation. Because of the highly generalized and at times even abstract language used in the Constitution, competent interpretation is imperative. For better or for worse few constitutional provisions are self executing or are susceptible of mechanical application. I may not refrain from working because the draftsmen have made my work difficult. Judgment and discretion are inevitable, and not even Judge

¹¹¹ Few seriously dispute this notion. R. DWORKIN, *supra* note 114, at 9.

Bork seriously denies this (p. 163, 167). The text of the Constitution is and must be our ultimate referent when questions of meaning are presented, for fidelity to law demands nothing less than that any interpretation of a legal text first and foremost must fit that text rather than some other text we may wish had been enacted. CLV demands the same.

The task of interpreting any rule of law is aided considerably where the Court may identify a coherent purpose the rule seeks to accomplish. This is as true of the Constitution as any other rule of law. Each clause of the Constitution expresses and has imbedded within it some notion of political morality or purpose. Yet, as I have explained above, no temptation should be resisted more strongly than that which seems so intuitively to come to the lawyer's mind. We should seek the intent of the framers, or in Judge Bork's corrected view, of the ratifiers. To be sure, laws do not come into being without the lawmaker having some purpose in mind. But we should not and cannot seek legal purpose by unpacking the thought process of the draftsmen. Legal purpose is sought in the objective accessible, world because that is often all that is accessible, and we always begin with the legal language. Indeed, that language is the only place we may legitimately search for the draftsmen's intent.¹¹²

Recognizing that the Constitution came into being as a purposeful act intended to accomplish identifiable purposes, we should interpret it as such. Beginning with the text, we must seek that purpose and meaning which both fits the text and best justifies inclusion of that text in the Constitution. Draftsmen's actual purpose is often pragmatic, fact specific and even base. Constitutional purpose properly pursued by judicial interpreters is exalted, idealistic, and contemporary. We ask what purpose could best justify the present promulgation of this provision of the Constitution. Oftentimes, we find this best statement elusive. Sometimes trial and error is our only way out. We identify as many purposes as we might imagine justifying the constitutional text of issue and then ask which construction today best commends itself as a reason why that text which is law should be law. All the while, we are keeping before us that a "constitu-

¹¹² Robertson, *supra* note 54, at 118.

tion is presumed capable of ordering human affairs decades beyond the time of ratification, under circumstances beyond the prescience of the draftsmen."¹¹³ We seek no historical fact. We do not inquire what the draftsmen meant. We ask what the clause means. We seek the best statement of purpose which may justify the clause today, given the world we live in.¹¹⁴

The Constitution makers have selected the medium of the written word within which to create, ratify and preserve the Constitution. Because that medium bears CLV sanction, we must accept and work with the properties of language, not to mention the human condition, in our interpretive enterprise. Rules of law being made by men are incapable of perfection. Because of our relative ignorance of fact and the relative indeterminacy of our aim, we make rules which include that we should wish excluded and which exclude that we should prefer included. Open texturedness is and will remain the order of the day, as our quiver is found filled with arrows bent by attitude and indeterminacy.¹¹⁵ Over-inclusiveness and under-inclusiveness attend all efforts to produce within law hard edged, case decider rules generating a regime of official arbitrariness. When we pursue the converse stratagem and employ more generalized forms of legal expression, we introduce a regime of unofficial arbitrariness, marked by inconsistencies, lack of predictability, and ad hoc judgments.

Interpretation must also regard the life of the law. Law is not something that is but is "a continuous process of becoming."¹¹⁶ We may no more freeze meaning and purpose of a con-

¹¹³ *Alexander v. State By and Through Allain*, 441 So. 2d 1329, 1334 (Miss. 1983). This principle applies not just to constitutional interpretation but to all forms of law for as I have written elsewhere, "Interpretation is more a function of the form of the rule than its species, though many miss the point." Whitten & Robertson, *supra* note 101, at 266.

¹¹⁴ Holmes provided an apt analogy outside the constitutional realm. The admiralty doctrine of personification of vessels has its historical origins in rules that satisfy vengeance by allowing the offended party to destroy the offending beast or thing. The rule existed a hundred years ago and was enforced against more pragmatic purposes which in time were seen its justification, although those purposes may have been unheard of at the rule's origin. O. HOLMES, *supra* note 12, at 5-35.

¹¹⁵ H.L.A. HART, *supra* note 5, at 121-32.

¹¹⁶ Hart, *Holmes' Positivism — An Addendum*, 64 HARV. L. REV. 929, 930 (1951).

stitutional text at the moment of ratification than we may freeze a living being at the moment of birth. We may extend the metaphor. A man bears his parents' genes and may never escape their imprint. A constitution bears a like link to its makers. A man bears as well the moral and behavioral teachings of his parents and the milieu in which he matures. And so of constitutions, and in their maturity they flourish insofar as they adapt to the imperatives of life in inevitably ambiguous and ever-changing times. I am a part of all that I have met and so is my Constitution, and so we must interpret its life as well as its language.¹¹⁷

In more conventional terms I am talking again about stare decisis. One case is decided interpreting a clause of the constitutional text. The second case arises. The imperatives of fit and justification remain tethered to the text but must at once make room for the prior decision. Following the lesson Justice Quixot unwittingly taught us in *Aardvark*, it is incumbent upon a court to decide the second case in a manner consistent in principle with the first, that is, so that a person can look at both cases and, by reference to the text, articulate a principle consistent with the text and which produces the results obtained in both cases.

My interpretive approach requires a horizontal consistency as well. The law may not be a seamless web but litigants are entitled to our best efforts to make it so.¹¹⁸ Each rule necessarily implies and reflects certain core values and purposes and necessarily does this imperfectly. Restricting interpretation to the literal language will invariably yield results inconsistent in principle. The imperative of principled non-result oriented adjudication mandates enforcement of core values. When interpreting a constitutional text, we must take account of other texts in the field including those which may appear inconsistent. Indeed, there are inconsistencies in the Constitution and at the most fundamental level, as Bork reports in his quite adequate description of the Madisonian dilemma - the co-existence of majority rule and minority rights (pp. 139-41). In the context of judicial review, Bork's eyesight is twenty-twenty when he sees

¹¹⁷ R. DWORKIN, *supra* note 14, at 348.

¹¹⁸ O. HOLMES, *supra* note 12, at 36.

that every expansion of individual constitutional rights diminishes "the liberty of the [majority of the] individuals who make up the community to regulate their affairs. . . ." (p. 229). When interpreting the constitution, we may not ignore any other texts fairly within the field nor may we ignore the origin or life of those texts. In the end, we afford them that reading which best fits the text today. We then seek the underlying purposes and principles which today best justify and explain the texts in the aggregate and best cohere among each other. These principles and purposes must serve as our bedrock for filling the gaps and resolving the uncertainties inevitably a part of our legal system of legal rules. Additionally, these principles interact electromagnetically among each other. Their combined electromagnetic force gives life to other principles and rules. Indeed, the process of interpolation and extrapolation is never ending. The words may not change, meaning inevitably will, for as Holmes has reminded us, "A word is but the skin of a living thought"¹¹⁹ and must not be mistaken for that thought.¹²⁰ This point is important for it means nothing less than the CLV-sanctioned medium is one bearing an inherent power to grow and adopt, not willy-nilly, but as the society that uses and sustains that medium grows and adopts.

There is a role for pragmatic instrumentalism in constitutional interpretation, a role that is both limited and fundamental. The role is limited in the sense that a court may not legitimately infuse its notion of public policy where that notion is not fairly embedded in the text. Even textually based, principled, politically neutral, non-result oriented adjudication is in the end grounded in policy preferences but I mean more than this. The Constitution is a limited and fragmentary document leaving many gaps, generalities and indeterminacies. With one technical modification, it is not at all clear to my mind that as a matter of arid legal logic, *Lochner* was wrong. Accepting that (linguistically) the due process clause may have no substantive dimension, and that procedurally proper legislative enactment may be all the process that is due, why isn't liberty of contract a

¹¹⁹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

¹²⁰ *Mississippi Ins. Guar. Ass'n v. Vaughn*, 529 So. 2d 540, 542 (Miss. 1988).

privilege or immunity¹²¹ protected by the fourteenth amendment? One may easily imagine any number of instances where, if some state's legislature substantially denied the right to contract, we would demand that the Court strike it down and be quick about it. Suppose some paternalistic legislature, having told us we must wear seat belts for our own good, moved on to enact that persons may no longer enter consumer secured credit transactions, declaring any such contracts unenforceable and that any who attempted to enter such contracts be guilty of a punishable offense. The Court would strike such a statute and no doubt on a legal theory not inconsistent with *Lochner*. We put up with much petty larceny in the name of the police power, but not grand larceny.

Lochner and progeny were wrong for very different reasons. *Lochner* was wrong because it proceeded upon an economic theory that a large part of the country did not entertain, Richard Posner to the contrary notwithstanding.¹²² *Lochner* was wrong because it represented a substantial invasion of the constitutional prerogatives of the states where the text could have been read otherwise. Most fundamentally, *Lochner* was wrong because it produced great public inconvenience, as the great majority of the people of the times understood their convenience, again, where the constitutional text was elastic. The Constitution does not turn us into "Starry Veres" who must hang Billy Budd no matter what. Courts must resort to notions of public policy in these contexts albeit with great caution and restraint. Beyond this we must never forget that law is not an end in and of itself but is only a means to the end of a tolerable society. The Constitution and the work of its judicial stewards must in the end prove acceptable to most of the people most of the time, a notion Judge Bork accepts in his concluding chapter (p. 353), a notion which I find also at the cornerstone of the concept of legal validity and which was powerfully put by Holmes a hundred

¹²¹ I take it no one will suggest that right (liberty), privilege and immunity be read in their technical Hohfeldian sense. See Hohfeld, *Some Fundamental Legal Conceptions as Applied In Judicial Reasoning*, 23 YALE L.J. 16, 18 (1917) (construction of privileges and immunities clause).

¹²² POSNER, *supra* note 16, at 86.

years ago.¹²³

X. YES, GEORGIA, THERE IS A RIGHT OF PRIVACY

Judge Bork reserves his big guns for the right of privacy,¹²⁴ and it is an interesting question, why? He complains that the right is "non-textual," but so is freedom of thought, and have we not all come to venerate thrice-wounded Union Army veteran Oliver Wendell Holmes' moving declaration, "[B]ut if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who are with us but freedom for the thought that we hate."¹²⁵ The right to travel¹²⁶ and freedom of association,¹²⁷ are equally "non-textual" rights that Judge Bork virtually ignores (pp. 97-98). And we have seen that judicial review is certainly non-textual. Still, Bork leaves no doubt of his view that there is no constitutional right of privacy in the United States. He declares his disdain for anyone who dares suggest otherwise. Such people are elitists, liberals and, of course, "out of control." Bork discusses a number of privacy cases, beginning with *Skinner v. Oklahoma*.¹²⁸ He concentrates particularly upon *Griswold v. Connecticut*¹²⁹ and *Roe v. Wade*¹³⁰ and, oddly, upon the four dissenting Justices in *Bowers v. Hardwick*¹³¹ as they had carried the day.¹³²

Many features of Bork's argument are striking. Enjoying a license he denies others, he goes outside the Constitution and into the realm of moral philosophy to attack arguments against the state authority to punish victimless crimes. He targets John Stuart Mill and comes forward to the present. His point seems

¹²³ O. HOLMES, *supra* note 12, at 41.

¹²⁴ I refer to the right that may perhaps be more accurately labeled the right to personal autonomy or an inviolate personality and being.

¹²⁵ *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1928) (Holmes, J., dissenting).

¹²⁶ *Edwards v. California*, 31 U.S. 160 (1941).

¹²⁷ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

¹²⁸ 316 U.S. 535 (1942).

¹²⁹ 381 U.S. 479 (1965).

¹³⁰ 410 U.S. 113 (1973).

¹³¹ 478 U.S. 186 (1986).

¹³² Curiously omitted is *Stanley v. Georgia*, 394 U.S. 557 (1969).

to be the suggestion, "knowledge that immorality is taking place can cause moral pain" (p. 123, 258), and that society has the authority to act through its legislative processes to protect against such pain. At the risk of stating the obvious, how would persons who are not engaged in the business of invading others' privacy ever experience this pain?

What is odd, the suggestion of moral pain aside, is Bork gives us not the first hint that any of these cases, with the possible exception of *Roe v. Wade* to be noted below, has caused the slightest public inconvenience. *Griswold* was a contrived case which held unconstitutional a statute which, according to Bork, "[H]ad never been enforced against anyone . . . and there was . . . no prospect that it would ever be enforced" (p. 95). *Eisenstadt v. Baird*¹³³ struck down a law regulating retail distribution of contraceptives. *Bowers v. Hardwick*¹³⁴ was a challenge to a Georgia sodomy statute in a case where, according to Bork, "The District Attorney [had] . . . decided not to prosecute - there had been no criminal prosecutions under the statute for decades" (p. 117). Again, abortion aside, we find no hint that the Supreme Court's privacy decisions are inflicting upon "democratic majorities" any unhappiness they may not avoid by simply ceasing to invade others' privacy. Elsewhere in his book, Judge Bork makes it clear that he is willing to endure many constitutional doctrines that offend TOU simply because they are well settled,¹³⁵ among these being some which inflict enormous inconvenience upon many of us, although the case can always be made that there are compensating benefits. In the privacy area Bork seems almost obsessed with exposing as heretical that doctrine which, according to his own description, causes little human harm. His fears go far beyond *Roe v. Wade* for, as much as he wishes the overruling of *Roe*, he is deeply concerned that the constitutional right of privacy is likely nevertheless to survive and to continue to work mischief. Curiously, he never tells us just what this mischief is likely to be or how it is likely to harm us (pp. 116, 126,

¹³³ 405 U.S. 438 (1972).

¹³⁴ 478 U.S. 186 (1986).

¹³⁵ The point merits a note. *Tempting* treats us to 355 pages of sound and fury and in the end seriously advocates undoing what the Court has done in *but one area* - the right to privacy (pp. 158-59).

159).

I would be the last to denigrate the value of pursuing truth for truth's sake. I certainly do not criticize the critique of legal doctrine simply because the doctrine is in error. I find value in such exercises. But when I step back from *Tempting*, I cannot help but wonder in the end why Robert Bork, the pragmatist, is willing to accept and live with so many violations of TOU that substantially affect the daily lives of many of us in ways we would like very much not to be affected, while the one TOU offense he cannot live with is the one that demonstrably inflicts the least harm upon anyone. What is the neutral, non-political, non-result oriented principle by which Bork decides which TOU offenses may be tolerated and which must be expunged? Does he have one other than his own personal preferences and value judgments? I think not.

At the risk of error, and worse, heresy, I believe the case for a constitutionally secured right of privacy is an overpowering one. It is at least as compelling as the case for a constitutionally created power of judicial review. To be sure, there is room for debate of the precise content of the right of privacy. There is room for debate regarding the places to which it extends and the conduct it protects. And abortion *may* be a special case. Still the argument that a right of privacy protecting under some circumstances both persons and places exists under the Constitution of the United States is, to my mind, convincing.

Preliminarily, I see a right to a legally declared zone of "unchecked discretionary action that others, whether private citizens or governmental authorities, may not invade."¹³⁶ It proceeds from a rule of the positive law which sets its boundaries, and that those boundaries are often seen as twilight zones is but an inevitable result of our inability to declare the law through the medium of language with greater precision. A right is an entitlement the individual who holds it may claim at his or her election no matter how inconvenient society or its members may deem it. That it may be so claimed is what defines it as a right.¹³⁷ It is the individual's protection from the majority's mo-

¹³⁶ *In re Brown*, 478 So. 2d 1033, 1036 (Miss. 1985).

¹³⁷ *Id.*

mentary madness.

In exploring whether there is such a "right" of privacy, such a zone of freedom within which the government and others may not intrude, I would employ the interpretive methodology I have described above. There and here I embrace that Borkian imperative that I must begin with text and employing "recognized legal principles," "[R]eason . . . in an intellectually coherent and politically neutral way . . . [my] result" (p. 2). I must not forget that a negative interpretation is as much of the interpretive genre as a positive one and that what matters in the end is the process I have employed toward interpretation and the competence and integrity of my use of that process.

I begin with the text of four provisions in the Bill of Rights. The first amendment proscribes governmental interference with speech or religion. The third amendment protects the home from the quartering of troops. The fourth amendment protects the individual and his home from unreasonable governmental searches and seizures. And the fifth amendment confers upon each of us a privilege against self-incrimination. Of similar genre is the sixth amendment's assurance of fair process to the most heinous of offenders, and the fifth amendment protects even the convicted from cruel and unusual punishments. Each of these is evidence of a strong concern with the integrity of the individual. The purpose apparent on the face of each is to provide the individual a zone of discretionary action he may claim as he will. Each protects the individual's integrity with a shield restraining government from that it may otherwise wish to do, indeed, from that it may have a legitimate interest in doing. Privacy is the word many of us use to describe the sphere of our lives these amendments rope off.

The ninth amendment is highly relevant in its positive declaration that rights beyond those specifically listed exist and are recognized in law. The ninth amendment provides the "specific textual support" Bork insists on (p. 113). Indeed, the ninth amendment seems designed to avoid precisely what Bork tries to do which is limiting the rights secured to those listed. This is nothing more than an interpretive trick we accept because we have a Latin maxim for it: *expressio unius est exclusio alter-*

ius.¹³⁸ The notion that a man's home is his castle has been around for a long, long time, and I cannot imagine that two hundred years ago, people did not assume this to be one of the most fundamental principles of life in a free society whether they had ever heard of the ninth amendment.¹³⁹ What is important is that the language of the ninth amendment read with the others places a moat around the entirety of that castle, not just the specific entrances that to the draftsmen's awareness had been most recently invaded.

In the case of the ninth amendment, TOU-qualifying materials are hardly plentiful,¹⁴⁰ and Judge Bork would no doubt like to wish it away, as he does the privileges and immunities clause. He knows he can't get away with that. He tackles the amendment and begins with a grammatical assessment of its words, and I would be the first to agree that this is the way to begin. He finds significance in "the placement of the ninth amendment just before the tenth and after the eighth substantive guarantees of rights," (p. 185) and I would agree again that structure is important. Drawing upon scanty evidence, Bork then says the ninth amendment protects only rights already secured to the people "by the various state constitutes, statutes and common law." This, of course, is what the tenth amendment does.

This point is worth a pause. The structure and wording of the ninth and tenth amendments shows them complementary, but hardly redundant. The tenth amendment reserves to the

¹³⁸ See, e.g., 3 CORBIN ON CONTRACTS § 552, 206-08 (1951) (subjects not named were intended to be excluded).

¹³⁹ Who can forget the ringing declaration of William Pitt, the Elder in the House of Commons, in March, 1763: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement." The court has reminded us that these words "echoed and re-echoed throughout the colonies" and both known to and believed by the ratifiers of the Bill of Rights. *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980); see *Dantzler v. State*, 542 So. 2d 906, 913 (Miss. 1989) (Robertson, J., dissenting) (sanctity of home); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890) (right of privacy long predated American Revolution).

¹⁴⁰ Randy E. Barnett has pulled together a variety of thoughtful pieces about the ninth amendment and provided us a rich mine of scholarship we may study with profit. R. BARNETT *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1989).

states all powers "not delegated to the United States by the Constitution, nor prohibited by it to the states." The tenth amendment thus gives the states full authority to vindicate rights not protected by the federal constitution and to do so by their "constitutions, statutes, and common law" as they see fit. Neither text, nor history, nor interpretive theory, nor common sense suggests the ninth and tenth amendments are but two ways of saying the same thing. It strikes me as more sensible to read the ninth amendment as a constitutional recognition that the people of this country, as individuals, enjoy rights against the government they may enforce no matter how inconvenient the government may find it, and that the "enumeration in the constitution of certain rights, shall not be construed to deny or disparage" those non-enumerated rights.

In any event, what Bork offers us is but one interpretation, but hardly one either TOU or text compels. How is it that Bork can legitimately rely on a single off-the-cuff quote from Madison (p. 185), no part of which suggests Madison has in mind any sharp distinction between positive rights or natural rights, and which in any event does not compel the conclusion Bork demands of it. I do not pretend to be an historian or scholar of this formative period of our country, but I take it as uncontroversial that the natural rights exhortations of the Declaration of Independence, not to mention the Virginia Declaration of Rights, section 1 (1776),¹⁴¹ reflected a common understanding of the times and that the matter of whether those rights should be em-

¹⁴¹ Without intending to be (completely) facetious, I suggest the following scenario is available even under Judge Bork's view of the ninth amendment. The ninth amendment secures the rights guaranteed under state law from federal interference. Georgia was one of the states that ratified the ninth amendment. Years ago Georgia recognized that a right of privacy was one of the natural rights of man which surely pre-existed the Constitution. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194-97, 50 S.E. 68, 72-74 (1904). Add to this Bork's endorsement of Russell Caplan's argument that the ninth amendment refers to rights already secured "by the various state constitutions, statutes, and common law" (p. 184). *Pavesich* is certainly a common law decision, preceding on the assumption that a right of privacy pre-dates and, indeed, precedes the constitution. Warren & Brandeis, *supra* note 139, at 193. The ninth amendment thus secures from federal interference each citizen's right of privacy and is enforceable against the states via incorporation theory which Bork tells us "as a matter of judicial practice . . . is settled" (p. 94) and that we "no occasion" to reconsider (p. 93). How then Bork's view of *Bowers v. Hardwick* which just happens to have arisen in Georgia?

bodied in written CLV form was a function far more of the fear of government than doubt of the reality of the rights. Unless I am mistaken, the Bills of Rights were seen at the times as performing almost an evidentiary function, satisfying a constitutional statute of frauds, if you will.

Samuel Warren and then lawyer Louis D. Brandeis traced the right of privacy back to England and well before the Constitution. The people who inhabited the social order grew and matured and gained insight and perception and so did the law that served them. Warren and Brandeis found the principle that explains much of our law summed up in the phrase "the right to an inviolate personality." Later, as a Justice of the Supreme Court, Brandeis articulated his premises and rhetorically described this right as "the right to be let alone"¹⁴² and asserted that it is the most cherished right of civilized man.¹⁴³ The right of privacy affects an "old value" (p. 169), nor did it cease to grow in 1791 or even in 1890. In his early article, Brandeis was concerned with private invasions of privacy and with the law's recognizing a right of action therefore. Later he became concerned with a right the state may not invade.

Concentrating upon the text of the first, third, fourth, fifth and ninth amendments, and reasoning backwards, I think it inconceivable that one could write these amendments as they have been written, not believing that there existed a right of privacy and personal inviolability of dimensions significantly greater than the specifics of the four specific amendments. No rational person who accepted principled consistency and the rule of relevant resemblances could have written those amendments if he did not so believe. More relevantly, no one familiar with the English language and the common and ordinary meaning of the words (whether in 1790 or today), upon reading the first, third, fourth, fifth and ninth amendments could reasonably form the impression that the individual's zone of personal inviolability which the government may not invade is limited to the specifics of quartering troops, unreasonable search and seizure, and the

¹⁴² Warren & Brandeis, *supra* note 139, at 211.

¹⁴³ *Olmstead v. United States*, 277 U.S. 438, 478 (1928); *Union Pac. Ry. Co. v. Bostford*, 141 U.S. 250, 251 (1891); *In re Brown*, 478 So. 2d 1033, 1039-40 (1985).

integrity of the individual's conscience.

No one who accepts the elementary principle of justice that like cases should be decided alike could adjudge the amendments so limited. Such a limit would be arbitrary, unprincipled. It would offend what Dworkin calls "the chief command of [law as] integrity, that the state act in a principled way."¹⁴⁴ The CLV-sanctioned texts along with the ninth amendment provide us a ratifier's value judgment that we may and ought interpret and refine to reflect more accurately the present and implicit premises. This right of privacy continues to become as other law. It makes no sense, to me at least, that the word liberty in the due process clause of the fourteenth amendment¹⁴⁵ should be held to exclude the right of privacy embodied in the principle undergirding the text of amendments one, three, four, five and nine. Without the ninth amendment, we would still be well up "the slippery slope of [reasoned] analogist" (p. 169). With that amendment, we have a textual grounding assuring that those of us who accept a right of privacy will not slide out of control and "ski it to the bottom" (p. 169). All of this derives from the most fundamental idea embedded in the Bill of Rights and, indeed, in the Declaration of Independence, the idea that the principal value to be vindicated by the government is the uniqueness and dignity and worth of each solitary life, which in turn generates a right of privacy and personhood each one of us may claim at our - not the government's - election.

Eschewing these thoughts, Judge Bork tells us that if we wish a right of privacy we should amend the Constitution and provide one. He denies he is objecting to there being a constitutional right of privacy, only to the means by which we have wrought it. With respect, he has things backwards. Our primary policy instrument is the democratically elected constituent assembly - the Congress, and at the state level, the legislature. Fundamental principles of justice and policy choices are enshrined in the Constitution, again via a democratic though ardu-

¹⁴⁴ R. DWORKIN, *supra* note 14, at 343.

¹⁴⁵ Recall that Judge Bork has told us that "as a matter of judicial practice the issue of 'incorporation' is settled" (p. 94) and that he finds "no occasion" to reconsider it (p. 93). The privileges and immunities clause, of course, could do the same work as well as the due process clause.

ous process. The product of these processes is eternally fragmentary and incomplete, and courts are charged to smooth off the rough edges, to interpret, or as we have seen. Courts must accept the democratically made fundamental policy choices placed in the Constitution and, as litigants call upon them, interpret them in a principled manner. What is crucial is that, absent a fairly expressed constitutional mandate to the contrary, courts may only draw reasoned distinctions. There is no reasoned distinction that may be drawn at the level of an underlying substantive principle, between the rights of privacy recognized, say, in *Griswold*, and those found in amendments one, three, four and five. This is the common law view of the judicial function as it was known before the constitution, and it is so well embedded in our life as a people that Justice Quixot could not exercise it in the fiftieth century. Of course, a constitution can draw arbitrary distinctions, and no good positivist would deny that the people have the power through the amendatory process to ban abortion as they once banned the sale of alcoholic beverages. Judges sworn to "administer justice" may not substitute caprice on grounds the constitution makers did not employ the language to perfection nor foresee all of the nuances of the policy choices they were making. One may not read the Bill of Rights and on principle deny the prior status of individual autonomy, privacy and the inviolate personality. To paraphrase Robert Bork, I find all of this a necessary inference from the structure of personal liberty on the face of the Bill of Rights (p. 155). It is incumbent upon those who would introduce arbitrary exclusions from that fundamental major premise that *they* secure an amendment to the constitution.

I said above that abortion may be an exception and the reason turns on the answer to the question whether we are dealing with one life or two. The answer to this question turns on when life begins (p. 111). Before life begins, I doubt it may be sensibly argued that a state's admittedly legitimate interest in protecting the development of a fetus may override a woman's constitutional right of an inviolate personality which includes bodily self determination if it includes anything. On the other hand, after life begins, the state unquestionably has the power to protect it and to prosecute those who take it, and when it should pursue

that power is a political question.

I regard abortion the toughest question in constitutional law today and will certainly make no attempt to resolve it here, except to say that everything turns on the question when within the meaning and contemplation of the Constitution life begins and to say, being the good positivist that I try to be, that courts may enforce only the answer they find in the law. Religious and ethical views inform the content of that law here as ever but courts may take note of no view of when life begins except that which is grounded in a constitutional text that passes muster under the criteria of legal validity. Accepting my view that law works best when it regards the realities of the phenomena it seeks to regulate, and conversely, that law generates much mischief when it pretends to declare reality other than it is, I find it anomalous that anyone would suggest that we turn the question of abortion back to the states. Although it may be hard to find and define when life begins, the idea that life begins at one point in time in Mississippi and at a different point in time in Arkansas or New Hampshire or Arizona, makes as much sense as saying that the sun rises in the east in Mississippi, in the west in Arkansas, in the north in New Hampshire, and in the south in Arizona.¹⁴⁶

XI. REFLECTIONS AND ASSESSMENT

The question comes: what assessment should we give the work Bork has given us? As with the Constitution, we must first agree on the criteria for assessment, an area where agreement is far less likely for we have no text which the CLV insists that we begin with.

One test of the value of a man's work is whether it provokes thought reasonably likely to lead to productive insight. Without question the work of Robert Bork passes this test. Whatever one

¹⁴⁶ Should *Roe* be overturned, I would not for a minute doubt the constitutional power of the several states to enact such constitutional laws as they deem expedient. Indeed, I would expect this to happen and that these would vary sharply. My point is that abortion does not seem to be the sort of subject that lends itself to "experiments . . . in the insulated chambers afforded by the several states." *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

thinks of it, Bork has been provocative and in ways sufficiently positive. He need have no fear of being convicted of having lived and not disturbed anyone.

A second criteria is whether a man's work moves us ahead. Whatever demerits there may be in this man's work, and I have pulled no punches in offering my opinion of these, *Tempting* takes several giant steps forward. For Bork has made clear that we must stop talking about original *intent* and talk instead of original *understanding*. He has identified the importance of focus upon the work of the ratifiers of the Constitution and not its authors. Beyond this Bork has directed our attention to the objective meaning of the Constitution, hence the word *understanding* instead of *intent*. He has taught that we should study the text. He enjoins that we not seek the subjective intention of the ratifiers of the Constitution, much less the authors but rather that we should always keep our focus upon a search for the objective meaning of the language. It is important that Robert Bork has said these things, for his work and words reach and appeal to an audience that would not likely be disposed to accept such premises from others. No doubt important struggles lie ahead in the field of constitutional interpretation and debate. At least we will no longer have to contend with the naive speaker's meaning version of original intent which in the past has raised its head with great ferocity and passion and has heretofore resisted its deserved interment.

But we will have to contend with the politicization of the law, Robert Bork notwithstanding, and this is so not only because of the nature of law and its processes, but because of who we have become as a people. Somebody loses every case before the Supreme Court, or any other court for that matter, and somebody is always offended at the law made en route. We are less and less willing to respect the work of judges like Robert Bork on grounds of demonstrated competence and diligence or that there is any such thing as intellectual honesty. We are particularly unwilling to accept that through his knowledge and experience and dedicated pursuit of the case at bar, a judge just might know a good bit about the matter at hand. We have lost the personal centeredness to care passionately and at once accept disappointment. We seem unable to grasp that someone

like David Souter, Ivy League educated, Rhodes Scholar, experienced appellate judge, married to the law, workaholic, mountain climber, avid reader of the Harvard Classics, a gentleman and scholar, is what, and all, we are or should be entitled to hope for. We have lost sight that the legal process at its very best yields but a crude approximation of justice and that is still preferable to the alternative. We have forgotten that suffering and sacrifice and self-discipline are essential elements of a life worth enduring. We resent interference with our prejudices and convenience. We do not know how to doubt.

Those of us who are judges contribute our share. We split five to four on fundamental questions, and, though dissent is inevitable and often valuable, the public and its would-be protectors in the press come to see our votes as but expressions of quasi-political preferences. Over and above our inherent human shortcomings, we debase ourselves. Our dissents are thinly veiled personal attacks. We forget the lessons Holmes taught, that reason and rhetoric pack more punch and possess more staying power than our puny personal assaults. We should read what Holmes wrote in *Lochner*¹⁴⁷ and *Schwimmer*¹⁴⁸ and in so many other decisions and not just be moved by the master's language, but see that there may not be found so much as a hint of disrespect for those who had disagreed and carried the day.

Several centuries of Anglo-American legal history provide a powerful tradition that judges are (somewhat) different. Karl Llewellyn captured the essence of this idea a number of years ago stating:

There is not only the matter of personal uprightness, nor only the queer but lovely impact upon a man as he dons the robe of a felt pressure to become a something more and better, more responsible, more dispassionate, more restrained, more careful, even wiser, than his mere unrobed self. There is the felt duty to use the law for decency and justice, there is the other felt duty of the craft . . . to reach for decency and justice only as permitted by the law ¹⁴⁹

¹⁴⁷ 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

¹⁴⁸ 279 U.S. 653-55 (1928) (Holmes, J., dissenting).

¹⁴⁹ K. LLEWELLYN, *THE BRAMBLE BUSH* 187 (1960).

In *Tempting*, Judge Bork gives the point a more practical rendering:

I have had, as many other judges have, the experience of reaching one result after reading the briefs and reversing my position at oral argument, or of voting one way at the judges' conference after argument and then changing my mind in the process of reading, discussion, and writing. I have had the even less pleasurable experience of publishing my opinion and then concluding I was wrong upon reading the petition for rehearing and having to change the result of the case. Many judges can testify to similar experiences (p. 71).¹⁶⁰

And this is in no way inconsistent with the existence of great judicial discretion. Few have done as much to open our eyes to judicial discretion as Karl Llewellyn. What Llewellyn is talking about is the right exercise of that discretion, the sobering feeling the judge experiences when he accepts his powers and their limits and that he can't blame all of what he does on the law. Still, whether out of refusal to take the time and trouble to learn legal process and reasoning, and thus to understand, whether out of refusal to accept that judges take seriously the limits of the law, or out of despair for the realization that those limits may seldom be declared with articulable precision, our citizens continue to ask: How many times did the judge vote pro-civil rights and how many times has he voted against it? How many times did the judge vote for invalidation of a statute and how many times has he voted to uphold one? How many times has the judge voted to affirm criminal convictions and how many times has he voted to reverse them?

Such questions make only slightly more sense than evaluating an umpire's performance by asking how many balls he called, and how many strikes? One day an umpire may call 180 balls and 120 strikes. The next day a different umpire may call 120 balls and 180 strikes. This does not mean one umpire is a liberal, the other a conservative. Nor does it mean that there

¹⁶⁰ One of mine that is particularly painful is *First Mississippi Nat'l Bank v. K LH Indus., Inc.*, 457 So. 2d 1333, 1336 (Miss. 1984). The theory of my original opinion was simply wrong and on rehearing I had to correct it. What hurt was the point of the case was one of civil procedure, a subject I am supposed to know something about.

were not in each game ten, twenty, thirty, maybe fifty pitches that could have been called either way. More likely, the numbers are a commentary on the pitchers' control than on the integrity of the umpires or even their eyesight. Still, different umpires do have different strike zones. Some umpires will give the pitcher the inside corner. Some will always give the batter the fast ball at the knees. Managers and players know all they may fairly expect of an umpire is personal integrity, knowledge of the rules, principled consistency, and a mighty heart that baseball be the best game it can be. And so it is with the law.

All rules of law imply value judgments but few are so weighted that one side should win every case, or even most. Not every civil rights plaintiff has a claim that should prevail. The law does not decree that every murderer should suffer death. Rates of affirmance and reversal are far more likely to reflect of the incidence of error at trial than of appellate judges' political agenda. I keep waiting, as I am sure Judge Bork did during his lengthy and arduous confirmation process, for some reporter, advocate, public interest group, or whoever to ask, how many cases did the judge decide correctly? By "correctly," I refer as much to process as to results, not that there is necessarily any reason to believe we would all agree on that one. But at least it is the right question.

In the end my thoughts and admiration for Robert Bork run along lines once suggested by Theodore Roosevelt. Roosevelt, who as President contributed greatly to the politicization of the law, once said:

It is not the critic who counts, not the man who points out how the strong man stumbled, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes short again and again; who knows the great devotions, and spends himself in a worthy cause, who at the best knows in the end the triumph of high achievement; and who at the worst, if he fails, at least fails while daring greatly; so that his place shall never be with those cold and timid souls who know neither vic-

tory nor defeat.¹⁵¹

Robert Bork has entered the arena of constitutional law and practice over and over for more than thirty years. Though his face is marred, he has striven valiantly and, I dare say, we should all agree that our law and our society are the better for his having done so.

¹⁵¹ *The Works of Theodore Roosevelt*, at 354 (Scribner mem. ed. 1923-26).

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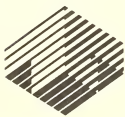
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